138-287

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1890.**

No. 1425.

THE WHEELING AND BELMONT BRIDGE COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE WHEELING BRIDGE COMPANY.

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IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE WEST VIRGINIA.

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**FILED OCTOBER 16, 1890.**

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*a* WEST VIRGINIA, *To wit:*

Pleas and proceedings in the supreme court of appeals on the 13th day of September, 1890.

Be it remembered that heretofore, to wit, at a supreme court of appeals held in Charlestown, in Jefferson county, on the 5th day of September, 1890, the following order was entered:

THE WHEELING BRIDGE CO., Plaintiff Below, Defendant in Error,
*vs.*
THE WHEELING AND BELMONT BRIDGE CO., Defendant Below, Plaintiff in Error.

Upon a writ of error and supersedeas to a judgment of the circuit court of Ohio county, rendered on the 16th day of April, 1890.

This day came the plaintiff in error, by A. J. Clarke and H. M. Russell, Esq's, its attorneys, and the defendant in error, by W. P. Hubbard, Esq., its attorney, and this case was partly heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, and is continued until to-morrow morning for further hearing.

*b* On the 6th day of September, 1890, the following order was entered in the above-mentioned case:

This day came again the parties, by their attorneys, and this case was fully heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel thereon; but, the court not being advised of its judgment to be given, time is taken to consider thereof.

And now, on the 13th day of September, 1890, being the day and year first hereinbefore mentioned, the following final judgment of the supreme court of appeals of the State of West Virginia was entered in this case:

The court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment. It is therefore considered by the court that the judgment of the circuit court of Ohio county, rendered in this case on the 16th day of April, 1890, be, and
1 the same is hereby, affirmed, and that the plaintiff in error do pay to the defendant in error thirty dollars damages and its costs about its defense in this court in this behalf expended, which is ordered to be certified to the circuit court of Ohio county.

A printed copy of the transcript of record referred to in the several orders made in this court in this case is hereto attached, and appended hereto and attached is a true copy of the opinion of the court referred to in the final judgment of the supreme court of appeals of the State of West Virginia in this case.

2 *Transcript of Record.*

Supreme Court of Appeals of West Virginia, Wheeling.

THE WHEELING BRIDGE COMPANY, Plaintiff Below, Defendant in Error,
*against*
THE WHEELING AND BELMONT BRIDGE COMPANY, Defendant Below, Plaintiff in Error.

From the circuit court of Ohio county.

Judges: Hon. A. C. Snyder, president; Hon. Henry Brannon, Hon. J. W. English, Hon. D. B. Lucas; O. S. Long, clerk.

3 Supreme Court of Appeals of West Virginia, Wheeling.

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

*Petition.*

To the honorable judges of the said court:

Your petitioner, The Wheeling & Belmont Bridge Company, respectfully shows that on the 8th day of February, in the year 1890, proceedings were begun against your petitioner in the circuit court of Ohio county by the Wheeling Bridge Company, wherein such action was taken by the court that afterwards, to wit, on the 16th day of April, in the year 1890, a judgment, final in its nature, was entered by the said circuit court against your petitioner as-
4 certaining the right of the said Wheeling Bridge Company to take from your petitioner certain land in the said proceedings particularly described and appointing commissioners to ascertain what the said Wheeling Bridge Company should pay for the value of the said land and damages to the residue of the tract from which it was to be taken. A transcript of the record in the case is herewith presented.

The case is briefly as follows: For some forty years your petitioner has maintained a bridge for the use of the public across the Ohio river at the city of Wheeling, springing from the eastern shore of the river and extending to the shore of what is known as "Wheeling" or "Zane's" Island. The petitioner was created a corporation by certain public acts of the Virginia Legislature, which also gave it certain rights with reference to the building and maintenance of its bridge and the acquisition of the ferry rights then existing. For many years before that time a public ferry had been maintained substantially in the location occupied by the bridge of your petitioner, and it was in full operation at the time when the various acts which together make up your petitioner's charter were passed by the Virginia Legislature. At the time of the passage of these acts also

the owner of the ferry had, under the law, the exclusive privilege of transporting persons and property across the river within a half mile of his ferry seat. The Legislature in chartering the petitioner included in one of the acts which constitute the charter the right to the petitioner to acquire and hold these ferry rights and privileges—not merely to extinguish, but to hold them. On the faith of this legislative declaration your petitioner purchased these ferry rights from their owners, and at a large outlay of money erected and has since maintained its bridge. The Wheeling Bridge Company, which was recently incorporated under the general laws of the State having, as it claims, submitted its plans to the Secretary of War and having met with no objection from that source, designs to erect and maintain a bridge for the use of the public in the transportation of persons and property across the Ohio river, and has selected for the site of its bridge
5 a position within a few hundred feet of your petitioner's bridge and much within the half mile already referred to. So near, indeed, is the new bridge to be, in accordance with the plans of the Wheeling Bridge Company, that that company has found it desirable to use for the western or island end of its bridge a parcel of land, twenty-five feet in width, which belongs to your petitioner and which your petitioner has for many years used in the maintenance and repair of its own bridge. This strip of twenty-five feet which is proposed to be taken is to be measured, according to the application for condemnation, from the north line of Ohio street, and in the course of the controversy it became a disputed question where the north line of Ohio street really and properly is, there being a difference in the location of it of three feet and six inches—the applicant placing it three feet and six inches farther south than your petitioner sought to have it located. Your petitioner has for many years had a stone pier, to which was attached certain guys or cables for the purpose of steadying its bridge, which is a suspension bridge. To strengthen this pier and to prevent the water from washing the earth away from it your petitioner had riprapped the southern corner and sides. If your petitioner's location of the north line of Ohio street is the correct location, this strip twenty-five feet in width which is sought to be condemned would include about six inches of the masonry of this guy pier and some ten feet of the riprapping. If the location contended for by the applicant be the correct one, then the twenty-five-foot strip sought to be condemned escapes the masonry of the guy pier, but includes about seven feet of your petitioner's riprapping—that is, seven feet longitudinally, measuring in a straight line from the pier to the nearest point on the street line and extending east and west in the manner shown on the plat (Exhibit "B" with C. C. Smith's evidence). In addition to the occupation of a part of the strip by its guy pier or riprapping, your petitioner had also for years made use of this land as a place on which to pile the lumber necessarily used by it in keeping its bridge in repair.

6 By the tender of pleas Nos. 5, 6, and 7 your petitioner sought to raise the questions whether under the law your

petitioner was not entitled to be protected from having another bridge located so near its own as materially to interfere with its tolls, and whether it was not also entitled, under the provision of the Constitution of the United States protecting contracts from violation, to be protected in the exclusive enjoyment of the right within half a mile of its bridge either way to transport persons and property, there having been in the acts of the Legislature constituting your petitioner's charter and referring to the exclusive privileges then vested by law in the owners of ferries a clearly defined contract between the Legislature and your petitioner that your petitioner should have as a part of its charter the exclusive privilege which was then vested in the ferry owner.

Having passed upon these questions and decided them adversely to your petitioner, the succeeding portions of the controversy mainly turned on the right of your petitioner to retain the land in question on account of the nature of its use.

Your petitioner is advised and shows that the said judgment rendered by the said circuit court was erroneous in the following particulars and because of the following reasons :

1. Because the said circuit court erred in rejecting your petitioner's pleas numbered five, six, and seven and each of them.

2. Because the said circuit court erred in admitting and excluding certain testimony in the course of the trial of the cause against your petitioner's objections, as set forth in the bill of exceptions.

3. Because the said circuit court erred in giving to the jury, at the instance of the Wheeling Bridge Company, the instruction which it gave, and in refusing to give, at your petitioner's instance, seven instructions which your petitioner asked the court to give, as set forth in the said bill of exceptions.

7 4. Because the said circuit court erred in refusing to require the jury to answer in writing certain questions set forth in the bill of exceptions.

5. Because the said circuit court erred in overruling your petitioner's motion for a new trial of the issue in the cause.

6. Because the said circuit court erred in ascertaining that the Wheeling Bridge Company had lawful right in said proceedings to take for its purposes the land sought to be condemned.

7. Because the said circuit court erred in ascertaining that the said land was necessary to the said Wheeling Bridge Company for the purpose of prosecuting its proposed work.

8. Because the said circuit court erred in ascertaining that the said land was not necessary for the enjoyment of the franchise of your petitioner.

9. Because the said circuit court erred in appointing commissioners to ascertain what will be a just compensation to your petitioner for the parcel of real estate proposed to be taken.

10. Because the said circuit court erred in confining the said commissioners to the ascertainment of the compensation for the land proposed to be taken and gave them no authority or direction to ascertain the damages to the residue of the tract from which this strip is proposed to be taken. When it is understood that the de-

fendant's bridge is upon this residue the radical nature of this error will be the more apparent.

11. Because the said judgment is in other respects uncertain, informal, and erroneous.

Your petitioner therefore prays that a writ of error and supersedeas may be awarded by this court to the said judgment, and that the said judgment may be reversed and annulled.

And your petitioner will ever pray, &c.

A. J. CLARK AND
HENRY M. RUSSELL,
*Attorneys for Petitioner.*

8 I, Henry M. Russell, an attorney practicing in the supreme court of appeals of the State of West Virginia, do certify that in my opinion it is proper that the decision of the circuit court of Ohio county complained of in the foregoing petition should be reviewed by the said supreme court of appeals.

HENRY M. RUSSELL.

May 9th, 1890.

A writ of error and supersedeas are awarded as prayed for in the foregoing petition, to take effect upon the petitioner or some one for it entering into bond, with good security, before the clerk of Ohio county, in the penalty of $1,000.00, conditioned as required by law.

JOHN W. ENGLISH,
*A Judge of the Supreme Court of Appeals of West Virginia.*

To O. S. Long, clerk.
May 12th, 1890.

9 *Record.*

WEST VIRGINIA:

Pleas and proceedings before one of the judges of the circuit court for Ohio county, at the court-house of said county, on the 16th day of April, 1890, and in the 27th year of the State.

Be it remembered that heretofore, to wit, at a circuit court held for the county of Ohio, at the court-house of said county, on the 8th day of February, 1890, among other the following proceedings were had:

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Petition for appropriation of land.

This day came the Wheeling Bridge Company and filed its petition applying for the appointment of commissioners to ascertain what would be a just compensation to the Wheeling and Belmont

Bridge Company for a certain parcel of land in the said city of Wheeling, Ohio county, West Virginia, proposed to be taken for the purposes of said Wheeling Bridge Company. It is thereupon ordered that notice be served upon said Wheeling and Belmont Bridge Company that said petition will be heard at a special term of this court on the 21st day of February, 1890, or as soon thereafter as possible. Such hearing is now set for the 21st day of February, 1890, in part 2 of this court, to which this matter is now transferred.

*Petition.*

To the honorable judges of the circuit court for Ohio county, West Virginia:

Petition of the Wheeling Bridge Company for the condemnation of land belonging to the Wheeling and Belmont Bridge Company.

The Wheeling Bridge Company, a corporation under the laws of the State of West Virginia, respectfully represents that it is a corporation created and existing under the laws of the State of West Virginia for a work of internal improvement—that is to say, for the purpose of constructing and maintaining a bridge across the Ohio river, and with authority and right to construct a bridge from a point on the east side of the main channel of the Ohio river, north of the public landing, in the city of Wheeling, to a point on Wheeling Island, in said city, nearly opposite such first-mentioned point. The bridge so to be constructed by your petitioner is to be for public use. In order to construct said bridge and the approaches thereto it is necessary to build the same over and take a certain parcel of land belonging to the said Wheeling and Belmont Bridge Company, which parcel of land lies on Wheeling Island, in the city of Wheeling, Ohio county, West Virginia. The parcel of land proposed to be taken by your petitioner for the purpose of building its said bridge and the approaches thereto is fully described on the plat herewith filed, marked "plat," and prayed to be considered as a part of this petition. The said parcel is more particularly bounded and described as follows: Beginning at the northeast corner of Ohio and South Front streets, on Wheeling Island, in the said city of Wheeling, thence northwardly with the said line of South Front street twenty-five feet; thence easterly parallel with Ohio street about three hundred and twenty-six feet to low-water mark in the bed of the Ohio river; thence southwardly with the low-water mark in the bed of the said river to the north line of Ohio street extended eastwardly; thence westwardly with said extended line of Ohio street about three hundred and twenty-six feet to the beginning corner. The said parcel of land contains about thirty perches.

Your petitioner avers that there is no lien or charge upon the parcel of land above described.

Your petitioner avers that its president and directors cannot agree

with the said Wheeling and Belmont Bridge Company on the
11 terms of purchase of said land, which is wanted as aforesaid for the purposes of your petitioner, although your petitioner has made an effort to come to an amicable agreement therefor with those entitled thereto.

Your petitioner avers that it intends to use and appropriate the parcel of land aforesaid for the purpose of constructing and maintaining the said bridge and the approaches thereto, and that said parcel of land is necessary for such purposes.

Your petitioner prays this honorable court that notice be given to the said Wheeling and Belmont Bridge Company of the filing of this application, and that the same will be heard on February 21st, 1890.

Your petitioner further prays that commissioners may be appointed by this court to ascertain what will be a just compensation to the said Wheeling and Belmont Bridge Company for the parcel of land hereinbefore described proposed to be taken by your petitioner for the purposes aforesaid.

Your petitioner prays that such other proceedings may be had in the premises to conform to law, and that upon the payment by your petitioner of the compensation so to be ascertained the title of the above-described parcel of land so proposed to be taken may be fully vested in your petitioner.

Your petitioner also asks such other and general relief as the court may see fit to grant.

W. P. HUBBARD,
*Att'y for The Wheeling Bridge Company, the Petitioner.*

(For plat see manuscript, page 6.)

And at another day, to wit, at a circuit court held for the county of Ohio, at the court-house of said county, on the 21st day of February, 1890.

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Petition for appropriation of lands.

This day came as well the Wheeling Bridge Company as
12 the Wheeling and Belmont Bridge Company, by their respective attorneys, and, it appearing that due notice of the hearing of the petition aforesaid has been given to the Wheeling and Belmont Bridge Company, this matter is docketed. The said Wheeling and Belmont Bridge Company tendered seven pleas in writing, to each of which the petitioner objected on the ground that it is insufficient in law, and the argument of said objections is set for Monday, February 24, 1890.

*Notice.*

To the Wheeling and Belmont Bridge Company:

You will take notice that the Wheeling Bridge Company, a corporation under the laws of the State of West Virginia, has filed its petition in the circuit court, part 1, of Ohio county, West Virginia, applying for the appointment of commissioners to ascertain a just compensation to you as the owner in fee of the following-described real estate proposed to be taken by said petitioner for the construction of bridge across the east channel of the Ohio river and of the approaches to such bridge, in the city of Wheeling, Ohio county, West Virginia—that is to say, a parcel of land bounded and described as follows: Beginning at the northeast corner of Ohio and South Front streets, on Wheeling Island, in the said city of Wheeling, thence northwardly with the east line of South Front street twenty-five feet; thence eastwardly parallel with Ohio street about three hundred and twenty-six feet to low-water mark in the bed of the Ohio river; thence southwardly with the low-water mark in the bed of said river to the north line of Ohio street extended eastwardly; thence westwardly with said extended line and with the north line of Ohio street about three hundred and twenty-six feet to the beginning corner. The said parcel of land contains about thirty perches. A plat showing the land proposed to be taken is filed with the petition and marked "plat."

You will further take notice that the said petition has been transferred to part 2 of said court, and that said court, part
13 2, will be asked to hear said petition and appoint said commissioners on Friday, February 21, 1890.

THE WHEELING BRIDGE COMPANY,
By W. P. HUBBARD, *Its Att'y.*

Wheeling, W. Va., February 10, 1890.

(*Sheriff's Return.*)

J. N. Vance, the president of the Wheeling & Belmont Bridge Company, the within-named defendant, being absent from the county of Ohio, I served the within notice upon the said Wheeling and Belmont Bridge Company by delivering a copy of the said notice, this 10th day of February, 1890, to Joseph Lawson, the person appointed pursuant to law to accept service of process for said Wheeling and Belmont Bridge Company, the said Joseph Lawson being also the secretary of said company.

HERMAN BENTZ, *D. S.*,
For LEWIS STEENROD, *S., O. C.*

And at another day, to wit, at a circuit court held for the county of Ohio, at the court-house of said county, on the 1st day of March, 1890:

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Petition for condemnation of land.

This day came again the parties, by their attorneys, and the objections heretofore made by the plaintiff to each of the seven pleas in writing tendered by the defendant having been argued by counsel at a former day of the term, the court, being fully advised of its opinion, doth overrule the objections to said pleas numbered one, two, three, and four, and doth sustain the objections to pleas numbered five, six, and seven, and doth reject the three pleas last mentioned; to which ruling of the court with reference to the three last-named pleas and each of them the defendant excepted, and on its motion the said three pleas numbered five, six, and seven are made parts of the record herein and identified by the signature of the clerk of this court; and the petitioner replies generally to each of said pleas numbered one, two, three, and four, which are now
14 filed, and issue is joined thereon, the trial of which issue is set for a special term hereafter to be called. To so much of this order as directs a trial at a special term the defendant objects and excepts.

*Plea No.* 1.

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceeding to condemn land.

The said defendant for plea says that the said parcel of land in the said petition mentioned and sought to be condemned is not necessary for the purpose of maintaining the bridge of the said petitioner or the approaches thereto, and of this it puts itself upon the country. Wherefore the said defendant prays judgment whether the said petitioner ought to have or maintain the said proceeding against it.

H. M. RUSSELL AND
A. J. CLARKE,
*Att'ys for Defendant.*

*Plea No.* 2.

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceedings to condemn land.

The said defendant, for further plea, says that it is a corporation

organized under a charter granted by the State of Virginia for the purpose of authorizing the defendant to erect a bridge across the Ohio river at or near the town of Wheeling, and that, in pursuance of said charter and the powers and authorities from time to time granted and confiemed by the Legislature of said State, the said defendant erected and has for years maintained for public use, in consideration of the tolls lawfully exacted by said defendant, a wire suspension bridge extending from the eastern shore of the said river at Tenth street, in the said town or city of Wheeling, to the eastern shore of Zane's or Wheeling Island, at Virginia street
15 on said island, and that the said parcel of land mentioned in the said petition and sought to be condemned as aforesaid, and the whole of the said parcel, was at and before the time of the commencement of the present proceeding and still is held and owned by the said defendant for use in maintaining its said bridge, and for no other purpose whatever; and the defendant says that the whole of the said parcel of land is necessary to the proper exercise of the franchise of the defendant; and this the said defendant is ready to verify. Wherefore the said defendant prays judgment whether said petitioner ought to have or maintain the said proceeding against it.

H. M. RUSSELL AND
A. J. CLARKE,
*Att'ys for Defendant.*

*Plea No. 3.*

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceeding to condemn land.

The said defendant, for further plea, says that it is a corporation organized under a charter granted by the State of Virginia for the purpose of authorizing the defendant to erect a bridge across the Ohio river at or near the town of Wheeling, and that, in pursuance of the said charter and the powers and authorities from time to time granted and confirmed by the Legislature of said State, the said defendant erected and has for many years maintained for public use, in consideration of the tolls lawfully exacted by said defendant, a wire suspension bridge extending from the eastern shore of the said river at Tenth street, in the said town or city of Wheeling, to the eastern shore of Zane's or Wheeling Island, at Virginia street on said island; and the said defendant says that in order to the proper support and maintenance of its said bridge it is necessary that the defendant shall have, and the said defendant at and before the beginning of this proceeding had and still has,
16 upon the said parcel of land in the said petition mentioned and sought to be condemned a large and heavy structure of

stone masonry surrounded and supported by large stones, which structure is called a "guy pier," and was and is used as an anchor or place to fasten certain "guys" or wire cables extending from the said pier to the said defendant's bridge, at the side thereof, to stay or steady the said bridge; and the said defendant says that the whole and every part of the said guy pier and of the said stone supports are, and were when this proceeding was begun, used by the said defendant for the purpose of maintaining its said bridge, and for no other purpose, and that the whole and every part thereof are necessary to the proper exercise of the franchise of the said defendant; and so the said defendant says that the said parcel of land described in the said petition and sought to be condemned is necessary to the proper exercise of the franchise of the defendant; and this the said defendant is ready to verify. Wherefore the said defendant prays judgment whether the said petitioner ought to have or maintain the said proceeding against it.

H. M. RUSSELL AND
A. J. CLARKE,
*Att'ys for Defendant.*

*Plea No.* 4.

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceeding to condemn land.

The said defendant, for further plea, says that it is a corporation organized under a charter granted by the State of Virginia for the purpose of authorizing the defendant to erect a bridge across the Ohio river at or near the town of Wheeling, and that, in pursuance of the said charter and the powers and authorities from time to time granted and confirmed by the Legislature of said State, the said defendant erected and has for many years maintained for public use, in consideration of the tolls lawfully exacted by said
17 defendant, a wire suspension bridge extending from the eastern shore of the said river at Tenth street, in the said town or city of Wheeling, to the eastern shore of Zane's or Wheeling Island, at Virginia street on said island. And the said defendant says that in order to the proper support and maintenance of its said bridge it is necessary that the defendant shall have, and the said defendant at and before the beginning of this proceeding had and still has, upon the said parcel of land in the said petition mentioned and sought to be condemned a large and heavy structure of stone masonry surrounded and supported by large stones, which structure is called a "guy pier," and was and is used as an anchor or place to fasten certain "guys" or wire cables extending from the said pier to the said defendant's bridge, at the side thereof, to stay or steady the said bridge. And the said defendant says that the whole and every

part of the said guy pier and of the said stone supports are and were when the proceeding was begun used by the said defendant for the purpose of maintaining its said bridge, and for no other purpose, and that the whole and every part thereof are necessary to the proper exercise of this franchise of the said defendant. And the said defendant says that the said "guy pier" and the said stone supports surrounding the same are placed upon and occupy a portion of the parcel of land in the petition mentioned and sought to be condemned—that is to say, a strip thereof ten feet in width and about thirty feet in length, situated in the northern side of the said parcel, and beginning about two hundred feet east of South Front street, and running eastwardly adjoining the north boundary of the said parcel. And the said defendant says that the said portion of the said parcel sought to be condemned, which is so occupied by the said pier and the said supports, is necessary to the proper exercise of the franchise of the defendant. And this the said defendant is ready to verify. Wherefore the said defendant prays judgment whether the petitioner ought to have or maintain the said proceeding against it so far as the
18 same relates to the said portion of the said strip so occupied as aforesaid by the said pier and the said support.

H. M. RUSSELL AND
A. J. CLARKE,
*Att'ys for Defendant.*

*Plea No. 5.*

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceeding to condemn land.

The said defendant, for further plea, says that it is a corporation organized under a charter granted by the State of Virginia for the purpose of authorizing the defendant to erect a bridge across the Ohio river at or near the town of Wheeling, and that, in pursuance of said charter and the powers and authorities from time to time granted and confirmed by the said Legislature of said State, the said defendant erected and has for many years maintained for public use, in consideration of the tolls lawfully exacted by the said defendant, a wire suspension bridge extending from the eastern shore of the said river at Tenth street, in the said town or city of Wheeling, to the eastern shore of Zane's or Wheeling Island, at Virginia street on said island. And the said defendant says that by the acts of the said Legislature the said defendant was empowered to purchase, acquire, and hold all ferry rights and privileges between Zane's Island and the main Virginia shore at the city of Wheeling. And the said defendant says that in the year 1847 there was and for many years had been, at the city of Wheeling, between Zane's Island and the main Virginia shore, a ferry duly and lawfully maintained and owned by Henry

Moore, trustee, Daniel Zane, and Daniel C. List, trustee, together with the rights and privileges by law incident thereto, and that on the 20th day of September, in the year 1847, the said defendant, under the authority aforesaid, acquired by purchase and conveyance from the said Henry Moore, trustee, Daniel Zane, and Daniel C. List,
19 trustee, the said ferry and the said rights and privileges, and that the said defendant has since owned and enjoyed the same. And the said defendant says that its said toll bridge was erected and has since been maintained substantially in the location of said ferry, and that the said defendant, by maintaining its said bridge for the use of the public as aforesaid and otherwise has maintained in full force and vigor the rights and privileges appertaining to the said ferry as aforesaid. And the said defendant says that at the time when it acquired the said ferry and the said rights and privileges as aforesaid one of the rights, franchises, and privileges incident to the said ferry and the ownership thereof was the exclusive right to transport persons, animals, and vehicles across the said Ohio river within the limits of one-half mile of said ferry, and that the said defendant acquired the said last-mentioned right, franchise, and privileges by means of the said conveyance from the said Henry Moore, trustee, and has since owned and still owns the the same. And the said defendant says that the said bridge so proposed to be built by the petitioner, as in the said petition set forth, is intended by the petitioner to be located, and the whole of the said parcel of land in the petition mentioned and proposed to be condemned is situated, within a half mile of the location of the said ferry and of the location of the said defendant's bridge; and the said defendant says that the said bridge so proposed to be built by the said petitioner as aforesaid is intended by the petitioner to be a bridge for the transportation of persons, animals, and vehicles across the said river. And so the defendant says that the said petitioner has no right to build the said bridge so proposed to be built by it as aforesaid, and that its proceeding to condemn the said parcel of land of the said defendant is without authority of law. And this the said defendant is ready to verify. Wherefore it prays judgment whether the said petitioner ought to have or maintain its proceeding against it.

A. J. CLARKE AND
HENRY M. RUSSELL,
*Attorneys for Defendant.*

20 *Plea No 6.*

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceeding to condemn land.

The said defendant, for further plea, says that it is a corporation

organized under a charter granted by the State of Virginia for the purpose of authorizing the defendant to erect a bridge across the Ohio river at or near the town of Wheeling, and that, in pursuance of the said charter and the powers and authorities from time to time granted and confirmed by the Legislature of the said State, the said defendant erected and has for many years maintained for public use, in consideration of the tolls lawfully exacted by said defendant, a wire suspension bridge extending from the eastern shore of the said river to Tenth street, in the said town or city of Wheeling, to the eastern shore of Zane's or Wheeling Island, at Virginia street on said island. And the said defendant says that by the acts of the said Legislature the said defendant was empowered to purchase, acquire, and hold all ferry rights and privileges between Zane's Island and the main Virginia shore, at the city of Wheeling. And the said defendant says that in the year 1847 there was, and for many years had been, at the city of Wheeling, between Zane's Island and the main Virginia shore, a ferry duly and lawfully maintained and owned by Henry Moore, trustee, Daniel Zane, and David C. List, trustee, together with the rights and privileges by law incident thereto, and that on the 20th day of September, in the year 1847, the said defendant, under the authority aforesaid, acquired by purchase and conveyance from the said Henry Moore, trustee, Daniel Zane, and Daniel C. List, trustee, the said ferry and the said rights and privileges, and that the defendant has since owned and enjoyed the same; and the said defendant says that its said toll bridge was erected and has since been maintained substantially in the location of the said ferry, and that the said defendant, by maintaining its said bridge for the use of the public as aforesaid and otherwise, has
21 maintained in full force and vigor the rights and privileges appertaining to the said ferry as aforesaid; and the said defendant says that at the time when it acquired the said rights and privileges as aforesaid one of the rights, franchises, and privileges incident to the said ferry and the ownership thereof was the exclusive right to transport persons, animals, and vehicles across the said Ohio river within the limits of one-half mile of said ferry, and that the said defendant acquired the said last-mentioned right, franchise, and privileges by means of the said conveyance from the said Henry Moore, trustee, Daniel Zane, and Daniel C. List, trustee, and has since owned and still owns the same; and the said defendant says that the said bridge so proposed to be built by the petitioner as in the petition set forth is intended by the petitioner to be located, and the whole of the said parcel of land in the petition mentioned and proposed to be condemned is situated, within a half mile of the location of the said ferry and of the location of the said defendant's bridge; and the said defendant says that the said bridge so proposed to be built by the said petitioner as aforesaid is intended by the petitioner to be a bridge for the transportation of persons, animals, and vehicles across the said river; and so the said defendant says that out of the said powers and authorities granted to the said defendant as aforesaid and the acquisition by the said defendant of the said ferry and the said rights, privileges, and franchises arose a contract between

the said State of Virginia and the said defendant that the said defendant should have and enjoy, during its chartered existence, the exclusive privilege of transporting persons, animals, and vehicles across the Ohio river at all points within a half mile of the location of the said ferry, and that upon the formation of the State of West Virginia, in the ownership of the Ohio river and its shores, became a party to the said contract and bound by the same; yet the said defendant says that the Legislature of this State, not regarding the obligation of the said contract, on the 25th day
22 of March, in the year 1882, passed an act which provided that corporations might be formed for the purpose, and that when so formed they might erect and maintain toll bridges over the Ohio river for the transportation of persons, vehicles, and other things over the said river, and that no ferry privileges or franchises should preclude the erection of such bridges or entitle the owner of such privileges or franchises to damages in case of any such bridge; and the said defendant says that the only authority of law which the said petitioner has or pretends to have for the erection of the bridge so to be erected and maintained by it as aforesaid is the said act of the Legislature of West Virginia; and the said defendant says that the last-mentioned act is unconstitutional and void as impairing and in so far as the same impairs the obligation of the said contract between the said States of Virginia and West Virginia and the said defendant; and so the defendant says that the said petitioner has no right to build the said bridge so proposed to be built by it as aforesaid, and that its proceeding to condemn the said parcel of land of the said defendant is without authority of law. Wherefore it prays judgment whether the said petitioner ought to have or maintain its proceeding against it.

A. J. CLARK AND
HENRY M. RUSSELL,
*Attorneys for Defendant.*

*Plea No. 7.*

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceeding to condemn land.

The said defendant, for further plea, says that it is a corporation organized under a charter granted by the State of Virginia for the purpose of authorizing the defendant to erect a bridge across the Ohio river at or near the town of Wheeling, and that, in pursuance of the said charter and the powers and authorities from time to time granted and confirmed by the Legislature of the said State,
23 the said defendant erected and has for many years maintained for public use, in consideration of the tolls lawfully exacted by said defendant, a wire suspension bridge ex-

tending from the eastern shore of the said river, at Tenth street, in the said town or city of Wheeling, to the eastern shore of Zane's or Wheeling Island, at Virginia street on said island; and the said defendant says that out of the said charter and the said powers and authorities so granted and confirmed and the erection of the said bridge in pursuance thereof arose a contract between the said State of Virginia and the said defendant that the said State would not during the chartered existence of the said defendant authorize or permit any other bridge for the transportation of persons, animals, or vehicles across the Ohio river so near to the said bridge of the said defendant as seriously to impair the value of the defendant's bridge by the diversion therefrom of the travel and tolls which would otherwise naturally flow in that direction; and the said defendant says that upon the formation of the State of West Virginia this State, as the successor of the State of Virginia in the ownership of the Ohio river and its shores, became a party to the said contract; and the said defendant says that the bridge so proposed to be erected as aforesaid by the said petitioner is intended to be a bridge for the transportation for toll of persons, animals, and vehicles over the said Ohio river, and that the proposed location thereof and the said parcel of land described in the petition are within five hundred feet of the said bridge of the defendant, and so near the latter that the erection and maintenance of the said proposed bridge of the petitioner will necessarily seriously impair the value of the defendant's bridge by the diversion therefrom of the travel and tolls which would otherwise naturally flow in that direction; and the defendant says that there is no authority of law for the erection of any such bridge by the said petitioner in the said proposed location except a certain pretended authority sought to be derived from certain public acts of the Legislature of the State of West Virginia; and
24 the said defendant says that the said public acts of the said Legislature of West Virginia, in so far as they purport to authorize the said defendant to erect or maintain the said bridge in the said proposed location, impair the obligation of the said contract, and are, as well as the supposed authority sought to be derived from them, unconstitutional and void; and this the said defendant is ready to verify. Wherefore the said defendant prays judgment whether the said petitioner ought to have or maintain the said proceeding against it.

A. J. CLARKE AND
HENRY M. RUSSELL,
*Attorneys for Defendant.*

And at another day, to wit, at a special term of the circuit court, held for the county of Ohio, at the court-house of said county, on the 31st day of March, 1890, among other the following proceedings were had:

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Petition for appropriation of land.

This day came the parties, by their attorneys, and thereupon came a jury, to wit:

*Jury.*

D. Radcliff, C. S. Terrell, David Gundling, Robert Nesbitt, Jacob Zilles, John Becker, Michael O'Kane, William Ray, R. V. Arkle James Anderson, J. E. Reed, and James G. Whyte, who were elected, tried, and sworn the truth to speak upon the issue joined, and, having partly heard the evidence, were adjourned until to-morrow morning at 9½ o'clock.

And at another day, to wit, at a special term of the circuit court, held for the county of Ohio, at the court-house of said county, on the 1st day of April, 1890:

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Petition for appropriation of land.

25 This day came the parties, by their attorneys, as well as the jury, pursuant to adjournment, and, having partly heard the evidence, were adjourned until to-morrow morning at 9½ o'clock.

And at another day, to wit, at a special term of the circuit court held for the county of Ohio, at the court-house of said county, on the 2d day of April, 1890.

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Petition for appropriation of land.

This day came the parties, by their attorneys, as well as the jury, pursuant to adjournment, and, having partly heard the evidence, were adjourned until to-morrow morning at 9½ o'clock.

And at another day, to wit, at a special term of the circuit court held for the county of Ohio, at the court-house of said county, on the 3d day of April, 1890.

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Petition for appropriation of land.

This day came the parties, by their attorneys, as well as the jury,

pursuant to adjournment, and, having fully heard the evidence and the argument of counsel and received the instructions of the court, retired to their chamber to consider of their verdict, returned into court, and, having arrived at no agreement, were adjourned until to-morrow morning at 9½ o'clock.

And at another day, to wit, at a special term of the circuit court held for the county of Ohio, at the court-house of said county, on the 4th day of April, 1890.

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Petition for appropriation of lands.

This day again came the parties, by their attorneys, as well as the jury, pursuant to adjournment, and the court, at the instance
26 of the defendant, having instructed the jury to bring in a separate verdict on each plea at issue, and having retired to their chamber to consider of their verdict, after a time returned into court, and on their oaths do say as to plea No. 1:

*Verdict.*

"On the within plea we, the jury, find for the plaintiff.
"D. GUNDLING, *Foreman.*"

And as to plea No. 2:
"On the within plea we, the jury, find for the plaintiff.
"D. GUNDLING, *Foreman.*"

And as to plea No. 3:
"On the within plea we, the jury, find for the plaintiff.
"D. GUNDLING, *Foreman.*"

And as to plea No. 4:
"On the within plea we, the jury, find for the plaintiff.
"D. GUNDLING, *Foreman.*"

And thereupon these several verdicts were put into formal shape by direction of the court as follows:

"We, the jury, find for the petitioner, The Wheeling Bridge Company, on each and all the issues joined.
"D. GUNDLING, *Foreman.*"

Whereupon the defendant moved the court to set aside the verdict of the jury rendered herein and grant it a new trial, the argument of which motion is set down for Monday, April 14th, 1890.

And at another day, to wit, at a circuit court held for the county of Ohio, at the court-house of said county, on the 16th day of April, 1890.

*Judgment.*

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Petition for appropriation of land.

27 This 16th day of April came again the parties, by their attorneys, and the motion of the defendant to set aside the verdict herein and grant a new trial having been argued by counsel and submitted to the court, and the court, being fully advised of its opinion thereon, doth overrule the said motion and refuse to set aside the verdict and grant a new trial herein; to which ruling of the court the defendant, by its counsel, excepted and tendered its bill of exceptions, praying that the same might be signed by the court and made a part of the record herein, which is here accordingly done.

Thereupon it is considered by the court that proper notice has been given herein, and that the petitioner, The Wheeling Bridge Company, has lawful right in this proceeding to take for the purpose stated in its petition the parcel of said land in the said petition mentioned and described, and for such purpose to acquire title to said parcel upon just compensation, and that it is necessary for the said petitioner to take the said parcel for the purpose of prosecuting its proposed work, and that said parcel is not necessary for the enjoyment of the franchise of the defendant; to which ruling and judgment of the court the defendant excepts and tenders its bill of exceptions thereto and asks that the same may be signed by the court and made part of the record herein, which is here accordingly done.

Whereupon thirteen disinterested freeholders were named by the court, of whom the applicant struck four from the list and the defendant also struck four from the list, and the remaining five disinterested freeholders—that is to say, James Devine, James McAdams, William Hare, B. F. Higgins, and William D. Johnson—are now by the court appointed commissioners to ascertain what will be a just compensation to the defendant, The Wheeling and Belmont Bridge Company, for the parcel of real estate in this proceeding proposed to be taken. It is further ordered that the said five commissioners be summoned and meet on the ground sought to be taken on Wednesday, April 23d, 1890, or as soon thereafter as they can assemble, to proceed to discharge the duty for which they are appointed. The defendant, desiring to apply to the supreme
28 court of appeals for a writ of error and supersedeas herein, moves the court to stay proceedings for a time to be fixed by the court, the argument of which motion is set for Saturday, April 19, 1890, and no action shall be taken under this order until the court shall have decided the said motion for a stay.

And at another day, to wit, at a circuit court held for the county

of Ohio, at the court-house of said county, on the 1st day of May, 1890.

WHEELING BRIDGE COMPANY
*vs.*
WHEELING & BELMONT BRIDGE CO.

On the 19th day of April, 1890, the matters arising on the defendant's application for a stay of proceedings under the order and judgment entered herein on the 16th day of April, 1890, was argued by counsel and taken under consideration by the court; and now, on the 1st day of May, 1890, came the parties, by their attorneys, and the court, having fully considered the said application for a stay, is of opinion that the same should be granted on the terms hereinafter set forth. Accordingly it is ordered that all further proceedings under the said order and judgment entered herein on the said 16th day of October, 1890, shall be stayed and suspended for twenty-five days from this date, when the said defendant, or some one for it, shall give bond before the clerk of this court in a penalty of five hundred dollars, conditioned according to law and with security to be approved by the said clerk.

*Bill of Exceptions.*

In the Circuit Court of Ohio County, to wit:

THE WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING & BELMONT BRIDGE COMPANY.

Be it remembered that upon the trial of the issues joined on the defendant's first, second, third, and fourth pleas heretofore filed the petitioner, to maintain the issue upon its part, introduced a witness, Gustave Kaufman, who testified as follows:

29 *Testimony of Gustave Kaufman.*

I reside in Pittsburgh, Pennsylvania; am a civil engineer, and have been engaged for ten years in the practice of that profession, and have had experience in the construction and location of railways and that of bridges and various things. I am one of the engineers of the Wheeling Bridge Company in the work which it proposes to construct, and am familiar with the piece of ground of the defendant described in the petition. That piece of ground is necessary to the petitioner for the building of its bridge. The location of the bridge given by the Government grant makes it necessary. The paper now shown me is the authority of the Secretary of War to construct a bridge at Wheeling.

And the foregoing being all the evidence which had then been introduced, the petitioner offered in evidence a paper in the following words and figures:

Whereas by act of Congress entitled "An act to authorize the construction of bridges across the Ohio river, and to prescribe the dimensions of the same," approved December 17, 1872, it is provided "that any persons or corporations having lawful authority therefor may hereafter erect bridges across the Ohio river for railroad or other uses upon compliance with the provisions and requirements of this act;" and

Whereas it is provided by section four of an act entitled "An act supplementary to an act approved December 17, 1872, entitled 'An act to authorize the construction of bridges across the Ohio river, and to prescribe the dimensions for the same,'" "that any person, company, or corporation authorized to construct a bridge across the Ohio river shall submit to the Secretary of War for his examination a design and drawings of the bridge and piers and a map of the location, giving for the space of at least one mile above and one
30 mile below the proposed location *to* topography of the banks of the river and the shore line at high water and low water. This map shall be accompanied by others drawn on the scale of one inch to two hundred feet, giving for the space of one-half a mile above the line of the proposed bridge and a quarter of a mile below an accurate representation of the bottom of the river by contour lines two feet apart, determined by accurate soundings, and also showing over the whole width of this part of the river the force and directions of the currents at low water, at high water, and at least one intermediate stage by triangulated observation or suitable facts. The maps shall also show the locations of other bridges in the vicinity, and shall give such other information as the Secretary of War may require for a full and satisfactory understanding of the subject, and the proposed bridge shall only be a legal structure when built as approved by the Secretary of War;" and

Whereas the Wheeling Bridge Company, a corporation organized under the laws of the State of West Virginia for the purpose of constructing and maintaining a bridge across each branch of the Ohio river at Wheeling Island, has submitted to the Secretary of War for his examination and approval the designs and drawings of bridges and piers and a map of the location of proposed bridges across the main and back channels of the Ohio river between the city of Wheeling, West Virginia, and the town of Ætnaville, Ohio; and

Whereas the chief engineer, United States Army, recommends that the plans submitted by the bridge company be approved:

Now, therefore, I, Redford Proctor, Secretary of War, having examined the designs and drawings and map of the location submitted by the Wheeling Bridge Company, which are hereto attached, do hereby approve the same, subject, however, to the following condition, viz: that the engineer officer of the United States in charge of the district within which the bridge is to be built may supervise its construction so far as may be necessary in order that the
31 plans herein approved shall be complied with and the bridge built accordingly.

Witness my hand this 26th day of October, 1889.

REDFIELD PROCTOR,
*Secretary of War.*

This instrument is also executed by the Wheeling Bridge Company, by Jno. McLure, its president, thereunder lawfully authorized, this 23d day of October, 1889, in testimony of the acceptance by said company of the provisions of the acts of Congress aforesaid and of the conditions herein imposed.

JNO. McLURE,
*President Wheeling Bridge Company.*

In the presence of—
CHARLES W. BROCKUNIER.
JOHN P. TROLL.

[Company's Seal.]

(Note.—The map, plans, and drawings referred to in the foregoing paper are omitted from this record by direction of the counsel for the parties to the suit.—Clerk.)

The petitioner thereupon offered the said paper in evidence, to the introduction of which the defendant objected, but the court overruled its objection and allowed the paper to be introduced, which was done, and the defendant excepted.

Continuing, the witness testified: From an engineering standpoint I think the location over the land mentioned in the petition is the best location that can be found, and one that causes the least damage to the people and everybody concerned.

Thereupon the defendant moved the court to exclude from the evidence the testimony of the witness contained in the answer above quoted, but the court ruled that "that as to the best location that can be found" may remain; the other may go out; and the defendant again excepted.

Continuing, the witness testified: The reason why I think that this is the best location that can be found is that on the eastern
32 side of the river there is no other place that will give us the same elevation which is necessary for us to possess, because it is necessary to bridge the river above high water 90 feet in the clear, and there is no place in Wheeling in that locality to give us an opportunity to reach that height. Then starting from the eastern side of the river it is necessary to cross at right angles to the current; that brings us out on the north of the mouth of Ohio street on the island. That is about the most important reason for locating in that place. The starting line brings you out so as to cross the property of the defendant, mentioned in the petition, and you have to cross over it.

On cross-examination the witness testified as follows:

I was the engineer who made the survey which resulted in this location. The strip of ground mentioned in the petition is necessary. We could not as well go twenty-five feet farther south; that wouldn't give us a good location, because we would run into Ohio street. We could not run down on Ohio street, because we could not blockade the

street. I do not suppose they would want us to close up the street. If you would pay no attention to the use of the ground for a street you could locate twenty-five feet further south; if there was no street and vacant ground and nobody would be affected by it, it would be possible to locate twenty-five feet farther south. We did not select this ground altogether because it was vacant ground. There would be no difficulty about going twenty-five feet farther south on the eastern side of the river and landing twenty-five feet farther south on the other side. It would be practically the same so far as the slope of the ground is concerned, paying no attention to the street or the buildings, but considering the tops of the banks of both sides it would be possible to locate the bridge a hundred feet farther down and avoid the street altogether. When I say that the land mentioned in the petition is necessary I do not mean altogether that it is simply convenient. The banks on both sides of the river must be taken into consideration, and a location a hundred feet farther south would not be as good as the present one on account of the grade of Main street,
33 which changes about one hundred feet south of our present location. Disregarding the buildings on both sides of the river, it would be practicable to put the bridge nearly a hundred feet south of its present location. In that case the bridge would run against Capt. McLure's house and other houses and the church on the south side of Ohio street. We wanted to avoid going through the church. It is not a fact that we located on the north side rather than the south side of Ohio street because the property on the south side would be more expensive than that on the north. If it had not been for the church we might have considered that matter. I was told by some one, I forget who, that we could not buy the church. We could build the bridge just as well south of Ohio street as north of it, with a little more money. It would take more money to buy the property, but not any more to build the bridge. The two locations are substantially the same, from an engineering standpoint. Going up above the defendant's bridge there would be difficulties on account of the fact that the currents in the river are changeable, which would make it impracticable to locate the bridge there. We looked into that matter. We could have located our bridge at Ninth street, above the defendant's bridge, without incurring difficulties. The land mentioned in the petition is only necessary because we located the bridge at this particular point and had the privilege of building there. The Secretary of War gave the permission we asked for to build there after some modifications and changes were made. The location was selected by our bridge company and not by the Secretary of War. The map already introduced shows the location of the petitioner's proposed bridge, the red line showing the center line, and the location with respect to the suspension bridge of the defendant and the lines of Ohio, Front, and Penn streets are correctly shown. The bridge is to be built twenty feet on each side of the center line.

On redirect examination the witness testified as follows:

On the eastern side of the river there is an alley at our pres-

34 ent location. One hundred feet south, there would be no public access to the bridge on that side. On the island side, if the bridge were located a hundred feet south, it would be south of Ohio street. According to the present location, part of the bridge will be on Ohio street. The Government will not grant permission to contract a bridge where currents are changeable, because the boatmen cannot steer the boats properly.

The petitioner then introduced a witness, J. ELLWOOD HUGHES, who testified as follows:

*Testimony of J. Elwood Hughes.*

I am the secretary of the petitioner. I received from the Secretary of War the plans which have been introduced in evidence. They were sent me in answer to a letter from me to the Secretary of War. This letter accompanied the plans received from the Secretary of War.

The petitioner thereupon offered in evidence a letter in the words and figures following:

*Letter.*

(Subject: Bridge across the Ohio river at Wheeling.)

R
2417
a

WAR DEPARTMENT,
WASHINGTON CITY,
*October* 28, 1889.

SIR: I beg to inclose for retention by the Wheeling Bridge Company a duly executed copy of an instrument expressing approval by the Secretary of War of the location and plans of certain bridges across the Ohio river between Wheeling, W. Va., and Etnaville, Ohio, authorized to be constructed under the provisions of the acts of Congress approved December 17, 1872, and February 14, 1883.

Very respectfully, REDFIELD PROCTOR,
*Secretary of War.*

Mr. J. E. Hughes, secretary Wheeling Bridge Company, Wheeling, W. Va. (Inclos. 3, 20, 21, 24, 26, and 27 of 2417 a.)

35 To the introduction of this letter in evidence the defendant objected, but the court overruled its objection and allowed the letter to be introduced in evidence, which was done, and the defendant excepted.

On cross-examination the witness testified as follows:

When I say I received this plan, which has been introduced in evidence from some one, I mean I received a package addressed to me containing the plan and the letter. I received them by mail, the certificate then accompanying the plan. I have no other knowledge, except from the fact that I received this package through the mail, of the source from which the letter and package came. I thought that knowledge was sufficient.

On redirect examination the witness testified:

This is the envelope in which these papers came.

The petitioner thereupon offered in evidence the envelope last referred, a copy of which is as follows:

2417 WAR DEPARTMENT,
a OFFICIAL BUSINESS.

(Any person using this envelope to avoid the payment of postage on private matter of any kind will be subject to a fine of three hundred dollars.)
(Registered Oct. 28, 1889, Washington, D. C.)

Mr. J. E. Hughes, 26135
Secretary Wheeling Bridge Co., Wheeling, W. Va. 26135

To the introduction of this envelope the defendant objected, but the court overruled its objection and allowed the same to be introduced, which was done, and the defendant excepted.

Thereupon the defendant, the foregoing being all the evidence which had at that time been introduced, moved to exclude from the jury the letter communication purporting to have been received from the Secretary of War and the plats attached thereto, on the ground that there was no proper identification of these papers and no proper proof that they had come from the source from which they purported to come; but the court overruled the said mo-
36 tion and refused to exclude the said papers, and the defendant excepted.

Thereupon the petitioner rested its case; and, the foregoing being all the evidence which had been introduced, the defendant moved the court to exclude from the consideration of the jury all of the evidence introduced on behalf of the petitioner, but the court overruled its motion and refused to exclude the said evidence, and the defendant again excepted.

Thereupon the defendant, to maintain the said issues on its part, introduced a witness, WILLIAM HILDENBRAND, who testified as follows:

*Testimony of William Hildenbrand.*

I live in New York; am civil engineer and have been for twenty years. I have had experience in the building of suspension bridges, my principal experience being in the building of the New York and Brooklyn bridge, on which I was engaged for thirteen years. I had special charge of the superstructure, making calculations for and inspecting the iron and steel used for it. I have also built several other suspension bridges. I am acquainted with the construction of the defendant's bridge, having been engaged to reconstruct it once in 1881 or '72, the second time in 1886 or '87, the last time being the time when the new floor was put in. I have been engaged for twenty years as consulting engineer of the firm of John Roebling, Son & Co., the chief engineer of the Brooklyn bridge. Every suspension bridge is liable to sway in heavy winds, and it is necessary

to guard against that. This is difficult to do, but one successful way is to put in guys on the side; and this plan has been employed with some effect in steadying the motions of the defendant's bridge. The guy pier on the south side of the defendant's bridge is an element of safety to the bridge, without which the bridge would run a great risk. Under certain circumstances and conditions and unforeseen circumstance in a wind storm the bridge might be wrecked; otherwise it would not be needed in connection with these guys
37 and piers. I have recently examined the defendant's guy pier. Riprapping, I would say, is one of the most important things to preserve the pier in the Ohio river, which has a swift current, and the pier should be protected by riprapping. I should certainly advise riprapping. I think the riprapping which is there now is necessary. I would rather increase it; it looks to me to be scarcely enough, to look at it, to keep it from undermining. The undermining would likely take place in times of high water, when the current is swift.

Thereupon the defendant proposed to ask the witness the following question:

"At what time would it likely happen that the bridge would be torn down by storm; would it be in combination with anything else or would it be by itself?"

To the asking of this question the petitioner objected, and the court sustained its objection and refused to allow the question to be asked, and the defendant excepted.

Continuing, the witness testified:

Question. Can you state from your knowledge in the building of suspension bridges what you especially provide against in the way of destruction of the bridges—a bridge such as the Wheeling and Belmont bridge?

Answer. Well, I provide against two things: the first is to make it sufficiently strong to stand the load; the second is to stiffen it by some means or other to make it stand against wind storms or stand hurricanes.

Question. Now, as to floods, what did you provide against as to them?

(Objection as leading.)

Question. What provision did you make against the destruction of bridges by floods?

Answer. In the suspension bridge or other bridges the principal protection is to protect the piers, to see the piers are not washed away; that is the principal damage by floods.

Question. And above all, this is important to provide against?
38 Answer. Yes, sir; it must be provided against, and should be provided against.

Question. In the case of the Wheeling and Belmont Bridge Co., will you tell what provision has been made against the destruction of that bridge by storm?

Answer. Yes, sir; the bridge has been guyed—that is, to the pierage—by guys which go in each direction. In the case of the defendant's bridge provision has been made against storms by guying the bridge to piers. The pier on the south side has several guys running from it to the bridge, and it is necessary to have a pier to hold the guys. If it were not there a storm would make the bridge sway and make it very uncomfortable for passengers, but if the storm was what we call a "hurricane" the bridge might blow over and get wrecked. The guys running from this pier run to different points along the floor of the bridge, and some of them divide, going to both the floor and the cables above the floor. Some of the guys run at larger angles to the longitudinal line of the bridge than others, and when the wind comes from the direction from which the guys run they tend to take off a part of the force of the wind from the floor of the bridge. In all there are four guys which run from this pier; some of them are fastened to a post which projects above the pier at the back and some are fastened to the masonry.

On cross-examination the witness testified as follows:

Question. What riprapping is there about that anchorage?

Answer. There is a little stone piled around it. It is loose stone; I don't know how much there is of it; as far as I could see, there was quite a good deal of riprapping. There looked to be some eight or nine feet, measuring along the surface in a southern direction or down the river; the lower side of the pier is the side that needs protection from floods more than the upper side; the upper side needs it, too; the pier wouldn't be safe without riprapping on the upper side. I didn't see any riprapping on the upper side
39 of the pier; it is not as safe as it might be with it. I don't know how long the pier has been there, but it has been a good many years—about twenty years—and the guys have been fastened to it for about the same time; the riprapping about the pier prevents the undermining of the ground. I don't know that it has any other purpose. There is what we call "riprapping" about the pier of the Brooklyn bridge; a hole made there and tramped full of cement and stone, the best kind of riprapping. Riprapping is not necessary when there is solid rock foundation, but is necessary when there is not a solid rock foundation. Having it tramped and filled in with cement and concrete is *is* better than riprapping. I think riprapping is good. The riprapping here is loose stone piled around the pier. There are guys on the Brooklyn bridge, but of different style from this on the defendant's bridge. They are fastened to the outside of the tower, which is wider than the defendant's by about a hundred feet. The guys are carried all the way across the river, some of them being four hundred feet in length, and at the towers are some seventy feet from the center of the bridge. The guys on the defendant's bridge are some two hundred or two hundred and fifty feet from the bridge. I think the effects of the wind in swinging the bridge is as much to be feared as its effects in lifting it up. The defendant's bridge is well protected from the up-and-down lifting. On the defendant's bridge I think the side motion is the worst.

Different suspension bridges have different systems of steadying against wind. One is the guy system and the other the regular wind system, which also uses the guys, but in a different way.

The witness was then asked this question: "You say this pier or anchorage is an element of safety to prevent the bridge against loss in case of a combination of circumstances?" To which he gave the following answer: "If a combination occur—what I would call a combination of circumstances—now, if there is a heavy wind storm and there is a big flood at the same time, and suppose the water comes up as high as the bridge, and there is a wind storm at the same time, I would say that was a combination of circumstances.

40 Thereupon the following questions were put and answers given by the witness:

Question. If you had a flood that reached up to the floor of the bridge and had a wind storm, then an anchorage would be an element of safety?

Answer. A pier or anchorage.

Question. If you had a flood coming up on the floor of the bridge and had a wind storm, in that combination of circumstances these guys would be an element of safety, would they?

Answer. Certainly, they are a means of safety.

Question. That is the combination of circumstances, is it?

Answer. I don't think that is the only one.

Question. That is the combination of circumstances you mean when you said the bridge company would be running a great risk in leaving off their guys?

Answer. There are different combinations of circumstances, I say. Probably that would be one, without thinking of any special one. Of course, there might be different conditions and combinations of circumstances.

Question. If the water was up to the beidge would there be any danger of the wind overturning it?

Answer. Yes, sir.

Question. How would the wind get at it to turn it over?

Answer. With a side wind the top can turn over.

Question. With these two cables on the side?

Answer. I don't mean with the cable as it is. I mean with no guys up to the floor. The cable wouldn't probably be injured, but the floor would be torn away.

Question. By what?

Answer. With wind.

Question. If water was up to the floor?

A. Yes, sir.

Continuing, the witness testified as follows: The ripraping is necessary on the lower side of the pier more than on the upper side, be-
41 cause it can be observed there is always an eddy formed by the current, and that eddy is the element that undermines piers on the lower side. I don't know whether there ever was

any riprapping on the upper side of this pier. The anchorage was never under my care, and I didn't inspect the guy piers at the time I took charge of the repairs to the bridge. I looked at the pier to-day and also yesterday. I looked at it from the bridge as well as from South Front street. I was within a hundred feet of the pier.

Thereupon, the foregoing being all the evidence which had been introduced, the petitioner's counsel proposed to ask the witness the following question:

"If it is a fact that there was riprapping above and below any pier, and the riprapping has gone from above and not gone from below, will you explain to the jury what effect that would have on your theory?"

To the asking of which question the defendant objected, but the court overruled its objection and allowed the question to be asked, which was done, and the defendant excepted.

Thereupon, in answer to the question, the witness said:

If I understand you right—in other words, you want me to prove that my theory is wrong; that the down stream doesn't need to be protected and you want me to prove——

Question. What I want to know is upon what you base your theory.

Answer. Theory is always correct and generally always shows the truth. Now, these stone may have been carried off by some one. I don't know anything about it. They might have been carried from there and they may have been washed. Some of the stone may have been washed away by water, but the lower side needs riprapping. I am positive about that, as one has always to protect by riprapping on account of the eddies. They bore in the ground sort of like a funnel and should always be protected.

The following questions and answers were then asked and given:

Question. Anyhow you are sure that the theory is always correct and facts not always correct?

Answer. The facts don't always show the truth.

42 Question. But the theory is always true?

Answer. Yes, sir; mine is always the truth.

Question. If the theory is directly opposite to the fact the theory is all right and the facts all wrong?

Answer. I would not say that. If the facts were inconsistent they would show they were not facts.

Question. You mean if the facts were examined they would turn out not to be facts?

Answer. They would show the plausibility and the possibility that the theory is correct.

Question. Do you believe that the theory is always correct and facts not always correct?

Answer. The facts in special cases might differ from theory.

Continuing, the witness testified with regard to this particular case: I would first have to examine the facts before I would have an opinion. If there is a high water and it takes away from the

upper side and takes out none from the lower side I might form a different opinion in a general way. When I say theory is always right I mean mathematical theory. As to the undermining of an abutment that is more based upon facts than mathematics, which has nothing to do with it; in such a case as this theory would have to give way to facts, which are more important than theory. If the riprapping has been washed away from the upper side I wouldn't say that it was more important to have it there than below. I would say that the lower side was more important, because the lower side of a pier has always to be protected, and this one would be an exceptional case if it did not need it. I didn't closely examine this particular pier. What I am talking about is theory based on experience, and the experience has been altogether at other places than this where the circumstances may or may not have been like these.

On redirect examination the witness testified: The two systems of staying are used, one in light and one in heavy bridges. I call the defendant's a light bridge. The guy system is cheaper than the wind system.

43 The defendant next introduced a witness, C. C. SMITH, who testified as follows:

*Testimony of C. C. Smith.*

I am a civil engineer and surveyor, and have been working for two or three years with my father, W. C. Smith; I worked for him off and on for six or eight years. The guys on the defendant's pier on the south of the bridge on the island side are fastened some to a post which extends about seven feet above the pier and some to the pier itself. There is a ring fastened to a point around the top of the post, and the guys are fastened to this ring. Mr. Hoge and myself made the survey from which I made the plat now shown me, which shows the southwest guy pier or anchorage of the defendant and its location with reference to Ohio and Front streets and the lines of Capt. McLure, Robinson, and Hughes.

The plat spoken of by the witness was then introduced in evidence, and is as follows:

Plat, Exhibit "B," C. C. Smith's evidence.

(For plat see manuscript, page 61.)

Continuing, the witness testified: The plat shows the lines of Ohio street, taking the Hughes, Robinson, and McLure lines as correct. These places are actually in a straight line and measure from this line sixty feet north. The north side of Ohio street runs fifteen and four-tenths feet from the southern extremity of the riprapping at the south of the defendant's guy pier and twenty-four and four-tenths feet from the guy pier itself. The measurements on the plat are correct. A line parallel with the north line of Ohio street as shown on this plat and twenty-five north of it would cut about seven inches on the corner of defendant's guy pier. The monuments we took on the south side of Ohio street were the lines of the fences en-

closing the property of Hughes, Robinson, and McLure at the corners respectively of Broadway, Penn, and Front streets. These fences made a continuous straight line of the street as it now
44 exists. We found the north line by measuring a sixty-foot street from the south line. On the plat introduced the distances between Front and Broadway and Penn and Penn and Broadway are not properly given, the lines being broken. Taking the Hughes and McLure corners as correct, we took the best line for the south side of Ohio street and found that to be a correct line. The north side of Ohio street as it now appears on the ground is not straight. The width of the street varies at Hughes and other points. On South Front street there is a house at the angle made by a bend in South Front street. The north line was very irregular. The whole of that line seemed to converge.

On cross-examination the witness testified as follows:

The two lines of Ohio street converge. I don't know that the north line converges toward the south more than the south line converges toward the north. I took as the basis the south line because it was the most consistent. I obeyed my father's instructions in doing this, which he gave me after having consulted with Mr. Hoge. He was in the employ of the defendant. The north line of Ohio street was the important line. I didn't take it, because it was irregular. At Robinson's corner the width of the street, measuring from the one fence to the other, 60.5 feet, and at McLure's it is 2 ft. 4 in. less. If the points on the north side of Ohio street at Penn and South Font streets be taken as correct, as shown by the enclosures and a line drawn through those to points protracted to the river, that line would be 3.2 feet farther south than the line which I have shown as the north line of Ohio St. when it would come to a point opposite to the defendant's guy pier. From that line the nearest point of the guy pier would be 27.6 feet distant. I took the south line of Ohio street because I tried it and found it was straight, and also because my father told me to. I would have had to take it, straight or crooked, after receiving these instructions. I don't know whether the fences are right or not. They have been there for a long time. I don't know how long. That doesn't satisfy me that they are correct. I did not inquire for ancient landmarks. If I would sur-
45 vey land for myself I would probably inquire for landmarks and measure the land and see how they agreed. It would depend upon circumstances whether I would consider the landmarks sufficient. If Capt. McLure's post is out on the street—encroaching on the street—the line I have shown as the north line of Ohio street is incorrect by two feet or more. I didn't take the north line, because I was doing the work for my father as his assistant, and I thought that was right. I suppose he and Mr. Hoge looked at the records. I know that Mr. Hoge did. He found the distances on Front street from Virginia to Ohio street. Along there is an angle in the middle of the block; that is one thing, but I don't remember anything else. If you take the line on Front street, as called for, from the corner of the old Hildreth building, it

would put the north line of Ohio street *street* eight-tenths of a foot farther north than I have placed it. The Hildreth house is an old house. The ground on which the guy pier stands between Ohio street and the defendant's bridge belongs to the defendant. The north and south distance is called for in the defendant's deed. I didn't measure that distance, because I was told not to by Mr. Lawson, the defendant's superintendent, who said that the defendant's land went to the north line of Ohio street, whether the line of the deed called for more or less. While I hadn't measured the distances, I think the line of the defendant's deed would throw Ohio street farther south than I have placed it on my map. Mr. Lawson said he didn't want it measured, because he said he did not care whether it ran further or not, and it would just make more bother if the line went further south. There was no monument at that point on the north side of Ohio street, that I know of. There is a sewer there which was put in without a survey. There was nothing else that I know of that Mr. Lawson told me not to measure. Mr. Hoge and I went to get the facts. He knew all about it. I knew the measurements to be taken. If I had been told not to measure it I would have done so. I had seen the deed. I saw a copy of the deed. I know my duty as a surveyor. Mr. Lawson told me to make certain measurements and I made that measurement. I obeyed in-
46 structions. I do not say that that is the correct way to ascertain the lines of this street. I don't know about it. I merely know that we did obtain the lines, and as to correctness or accuracy I think I did what was correct, as far as myself is concerned. I should have measured the line called for in the deed and think it should have been measured. Mr. Hoge was along at the time Mr. Lawson spoke to me and received the same instructions. I supposed the defendant wanted to throw Ohio street as far north as possible. There is an old plat that calls for the distances from the angle in South Front street to Ohio street. According to the defendant's deed for its land the distance from the bridge abutment to the north line of Ohio street extended is $259\frac{87}{100}$ feet. My line measures $256\frac{2}{10}$ feet. If that deed governs it would throw the north line of Ohio street $3\frac{1}{2}$ feet further south than I have it. I would be satisfied — we got the line too far north without looking further into it.

Petitioner reads in evidence the deed from Thos. Hornbrook's heirs to the Wheeling and Belmont Bridge Company in the following words:

*Deed.*

This deed, made this first day of March, 1882, between Triphena P. Hornbrook, widow of Thomas Hornbrook, deceased, and Dora L. Hornbrook and Charles P. Hornbrook, children and only heirs-at-law of Thomas Hornbrook, deceased, and Margaret L. Hornbrook, wife of the said Charles P. Hornbrook, of the first part, and the Wheeling and Belmont Bridge Company, of the second part, all of the county of Ohio, State of West Virginia, witnesseth:

That for and in consideration of the sum of thirty-five ($3,500) hundred dollars, by the said party of the second part to the parties of the first part in hand paid, the receipt of which is here acknowledged, the parties of the first part do hereby grant unto the party of the second part, with covenant of general warranty, the following-scribed *described* real estate, being a piece of ground or land on Wheeling Island, Ohio county, State of West Virginia, lying
47 southwardly of Virginia street and east of South Zane street, described and bounded as follows: Beginning at the south-east corner of the west abutment of the suspension bridge, on Wheeling Island and two (2) poles from the center of said abutment; thence down the east bank of the Ohio river, and bounded thereon south 7¾ east fifteen $\frac{75}{100}$ poles (S. 7¾ E. 15.75) to the corner of lot No. one (1) and in line with the north side of Ohio street; thence south eighty-one degrees west (S. 81 W. 14.60) poles to South Zane street, north 7.75 poles (N. 7.75 poles); thence north thirty-five degrees west nine poles (N. 35 W. 9 poles) to the wing of said abutment; thence with the said wing of the said abutment (north 81 east 17.50) poles to the beginning, containing one acre one rood and 30 poles of land, more or less, being the same property and tract of land conveyed by C. L. Zane to the said Thomas Hornbrook in his lifetime, by deed dated the 17th day of March, 1871, recorded in Deed Book No. 58, page 124, to have and to hold the said described tract of land to the party of the first part and its successors in fee simple.

Witness the signatures and seals of the parties of the first part.

TRIPHENA P. HORNBROOK. [SEAL.]
DORA L. HORNBROOK. [SEAL.]
CHARLES P. HORNBROOK. [SEAL.]
MARGARET L. HORNBROOK. [SEAL.]

STATE OF WEST VIRGINIA, }
*Ohio County.* }

I, Alexander Bone, notary public in and for the said county, do certify that Triphena P. Hornbrook, Dora L. Hornbrook, and Charles P. Hornbrook, whose names are signed to the above writing, dated the first day of March, 1882, have each this day acknowledged the same before me in my said county; also, I further certify that the said Margaret L Hornbrook, wife of the said Charles P. Hornbrook, whose name with her said husband and Triphena P. Hornbrook and Dora L. Hornbrook are signed to the above
48 writing, bearing date the first day of March, 1882, personally appeared before me in my said county, and being examined by me separate, privily, and apart from her said husband, and having the said writing fully explained to her, she, the said Margaret L. Hornbrook, acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this the second day of March, 1882.

ALEXANDER BONE,
*Notary Public in and for Ohio County, W. Va.*

WEST VIRGINIA, } *sct:*
*Ohio County.* }

I, George Hook, clerk of the county court of said county, do certify that the annexed writing, bearing date on the 1st day of March, 1882, was presented for and by me admitted to record in my office upon the above certificate as to the parties therein named this 3d day of March, 1882, at 2.35 p. m.

Teste: GEORGE HOOK, *Clerk.*

The foregoing being all the evidence introduced, the defendant introduced a witness, F. L. HOGE, who testified as follows:

*Testimony of F. L. Hoge.*

I am a civil engineer and city surveyor of the city of Wheeling, and have had experience in protecting piers, such as the defendant's guy pier, from the action of floods; I have made such things a study. The present condition of this guy pier necessitates its getting protection from the riprapping about it. The riprapping ought to extend at least as far as the present temporary riprapping is. I would protect that pier by driving piles and filling in with stones. I would put the riprapping about ten feet all around the pier. On the north or upper side of the defendant's guy pier there are, I believe, a few loose, large sandstones. There is a wall on the north side of
49 the pier running toward the west. I believe there is one wall west of it, but I don't know. I didn't observe any. On the east there is a large sandstone riprapping which extends about ten feet south of the southern end of the pier; this riprapping is necessary to protect it there; there is quite an eddy that would be formed against the pier; there is also a powerful eddy from the abutment of the bridge above this guy pier; the effect of the eddy would be the undermining of the abutment to the pier, and the riprapping is to prevent this.

This witness also gave evidence tending to prove that the north line of Ohio street west of South Front street is where that line is shown on the plat hereinbefore set forth in connection with the testimony of C. C. Smith. The witness Hoge stated, among other things, that the defendant's southernmost fence, at a point nearest the guy pier, is four-tenths of a foot north of the line as the witness established it, which was as shown on the last-mentioned plat. At the corner of South Penn street the said fence is two feet south of the last-mentioned line.

On cross-examination the following questions were asked and answered:

Question. You don't think this plat on the north line of Ohio street shown on it is right, do you?

Answer. From the basis I estimate it.

Question. You say the basis is right, do you?

Answer. Yes; it has governed me in other surveys.

Question. What do you say that line is the basis of?

Answer. That is not for me to decide; it is authority for that corner.

Question. You haven't much confidence in this line, have you?

Answer. Yes, sir; of course I did or I wouldn't have put it down.

Question. Do you think it is right?

Answer. Yes, sir.

Question. Did you avail yourself of all sources of information in making that line?

50 Answer. Yes, sir; all available to me.

Question. Did you omit any sources because Mr. Lawson wanted you to?

Answer. There was one omitted, but I availed myself of it. I knew it was there.

Question. Did you tell Mr. Smith about that?

Answer. I spoke to Mr. Smith about it.

Question. What was your measurement on that line?

Answer. 15.75 poles.

Question. What in feet?

Answer. 259.87.

Question. How does his north line of Ohio street compare with that?

Answer. I took another line that I took to show the line was——

Question. Excuse me. Stick to that line, the 259.87 feet.

Answer. Yes, sir.

Question. Tell me how that corresponds with the north line of Ohio street.

Answer. That measurement comes 3.55 feet south of the north line of Ohio street, as I located it.

Question. That measurement you ascertained from the deed of this land to the Belmont Bridge Company, didn't you? That line 15.75 poles?

Answer. Yes, sir.

Question. That is also the length of the line as shown by this plat, isn't it? (Showing witness plat in the following words and figures:)

(For plat see manuscript page 71½.)

Answer. Yes, sir; yes, sir, 15.75.

Question. Then you disregarded that measurement on that same plat when you located the north line of Ohio street?

Answer. I didn't disregard it. I omitted the plat. I was directed to make it.

Question. By whom?

51 Answer. By counsel.

Question. Counsel of the Belmont Bridge Company? Then it is their plat and not yours?

Answer. It is my plat.

Question. You made the plat upon the basis they suggested?

Answer. That was made before they were consulted in regard to it.

Question. What did you disregard that plat for—this line of 15.75 poles?

Answer. I claim I didn't disregard it.

Question. You claim your north line of Ohio street comes three and a half feet farther north?

Answer. You call it our north line. Whose is it?

Question. Christen it and I will take your name for it.

Answer. It is a line established by a fence on the south line of Ohio street.

Question. Then didn't you disregard that line designated in that plat?

Answer. Yes, sir.

Question. Did you disregard it in anything else about that that you haven't stated?

Answer. I wasn't asked anything about it.

Question. You disregarded it wholly in your testimony so far.

Answer. I have been asked a question about it and I have answered it.

Question. When you saw the plat did you disregard it?

Answer. I expected to be examined upon it and forearmed myself upon it. I haven't been a party to a plot to deceive any one.

Question. It is evident there is a plot to deceive some one.

Answer. No, sir.

Question. Why did you disregard that line?

Answer. I was employed by certain persons to make a survey, and it would have been foolish to make a survey they didn't want—to have something they wished omitted.

52 Question. They didn't want you to come over to find the exact line?

Answer. They told me to find the north side of Ohio street.

Question. Did they tell you to use all the facts within your reach?

Answer. They didn't tell me not to use any facts.

Question. On the other hand, didnt they tell you not to use certain surveys?

Answer. They told me to go and measure a certain line.

Question. That is an important fact?

Answer. Yes, sir.

Question. Is that plat right where you disregarded that line?

Answer. It is right so far as it goes.

Question. Is it not wrong, and don't you know that that plat don't go far enough, and for that reason is not right?

Answer. I always knew that the proper line ought to have been defined.

Question. Can't you answer my question?

Answer. To answer your question would probably put me in a false position. As I said before, it is right so far as I estimated the basis by the survey. As a plat representing a piece of property it is not right.

Question. The piece of property comes to the line of Ohio street, don't it?

Answer. It does.

Question. If that plat don't represent the piece right it don't represent that line right.

Answer. The distance called for is $15\frac{75}{100}$ poles, and places the one line of Ohio street there.

Question. If you had regarded that, it would place the line three and a half feet below that?

Answer. Yes, sir; it would have been placed there.

Question. Ought not that line to have been regarded?

53 Answer. That is a question for you legal gentlemen to decide.

Question. Ought not that line to be regarded?

Answer. Well, for instance, suppose that line——

Question. Ought not that line to have been regarded?

Answer. No, sir; I don't think it ought, from the basis I made from the survey.

Question. At the basis, to get the truth, ought not that line to be regarded?

Answer. Yes, sir; to get it right.

Question. It wasn't right to make the survey that way, was it?

Answer. As to that, it was right for me.

Question. Are you speaking of this survey?

Answer. I don't know their methods.

Question. If you had been told to go and ascertain from all the facts, would you not have regarded that line?

Answer. Of course I would.

Question. Who told you not to measure it?

Answer. Mr. Lawson told me not to measure it.

Question. How did he come to tell you that?

Answer. I can't answer that. I was in the act of doing it, and he said he didn't want it.

Question. You say you was in the very act of measuring at that time, and he said he didn't want it?

Answer. Yes, sir.

Question. Did you ask him why he didn't want it?

Answer. I said it was best to have it. I objected to it.

Question. You objected to leaving it out?

Answer. Mr. Smith and I consulted about it.

Question. What did Mr. Lawson say when he said he didn't want it?

Answer. He said he didn't want it,

Question. He didn't give any reasons for that?

Answer. He said he told us not to measure it.

Question. He said to tell somebody, if you was asked, that he told you not to measure it?

Answer. He said that he took the responsibility.

54 Question. In case you was asked that question you was to say that he had taken the responsibility to say not to measure it?

Answer. That is hearsay. It wasn't told me; it was told Mr. Smith; he told Mr. Smith that.

Question. In case he was asked that question as a witness on the stand, to say he had stopped it?

Answer. Yes, sir.

Question. When did Mr. Lawson tell you how to testify?

Answer. He didn't tell me personally at all.

Question. He told somebody else to tell you?

Answer. Yes, sir.

Question. Do you know how he came to instruct you as a witness as well as a surveyor?

Answer. I know my duty as a surveyor. I spoke of it somewhat to call his attention to it.

Question. What did you tell him?

Answer. I told Mr. Smith it would certainly be a question that would be asked.

Question. You realized the importance of that?

Answer. I did.

And, continuing, the witness testified as follows:

I have made no observation of the effect of the current or eddy on on the guy pier or anchorage, except in the condition in which it is now. I have seen the water running around it. I don't know that I observed how the water struck it sufficiently to answer. I looked at it in that respect. There is an eddy there, but I never observed it sufficiently to answer whether it strikes on the north or east side. The upper eddy is caused from the abutment of the bridge. I don't know where the worst eddy comes from, but the strongest would come from that abutment, which extends out into the river further than the anchorage and don't protect the anchorage very much from the current. It does protect it from the current. The anchorage looks as though it had sunk on the north side, but that might have been due to the strain on the guys. It is
55 washed all around. There are indications that it has been washed on the north side as well as on the south side. There is some new masonry on the south side above the riprapping. It looks as though the southern end of the guy pier had raised up and the northern end sunk. This might have been caused by the strain on the guys, and it might have been undermined on the north also. The undermining could not cause the sinking in any place else. The appearance of the anchorage indicates that it is washed more on the north than on the south. I have made a study of various bridges and piers in the city of Wheeling and county of Ohio, along the national road and Caldwell's run, some of which were still standing and some of which had been washed away.

The defendant next introduced WALTER C. SMITH, who testified as follows:

*Testimony of Walter C. Smith.*

I am a surveyor and civil engineer and have been for nearly fifty years. The plat put in evidence by defendant was made in my office. I have recently examined the defendant's guy pier situated

south of its bridge, north of Ohio street and east of South Front. There is some riprapping about it, but I cannot tell how deep or extensive it is. I suppose it is about six feet wide and it extends east of the south side of the pier. I have had experience, more or less, during my whole professional life with regard to the construction and location of bridges. I think the guy pier in question is necessary to the defendant's bridge for the purpose of checking the vibrations and oscillations of the bridge in high winds. If that support would be taken away the bridge would be likely to be injured and injuriously affected by the winds. A portion of this guy pier has already been undermined for want of proper riprapping. The riprapping there is not what I consider sufficient for the purpose, and it should be much heavier, as the east corner of the pier has been undermined to some extent. I could not tell how far without
56 making soundings, but the pier has the appearance at the north of having been already undermined and repaired. It looks like new work and is different from the others, but I cannot tell whether it is really so or not, but that is the portion of the pier that is exposed for want of proper protection. I think riprapping a necessary protection to the pier—riprapping or some other kind of protection to guard it against the eddies and the driftwood coming against the corner of the pier. In time of high water the eddies would have the effect of driving the current around the pier, and would have the tendency to undermine it and wash away the sand foundation which is usually formed by the eddies around the pier. Riprapping has a tendency to shield the pier from the current of water which circles around the pier at times of high water. Riprapping is easily replaced if washed away. If heavy enough it is difficult to wash away.

This witness also gave evidence tending to prove that the north line of Ohio street is where that line is shown on the plat hereinbefore set forth with the evidence of C. C. Smith.

On cross-examination the witness testified:

By the east corner I mean the corner of the pier closest to the river. The pier is likely to be undermined at the point at which the current strikes it most strongly. By an eddy I mean where the current is drawn from its direct course and drawn around the abutment of the pier. The pier is undermined where the current strikes it; that is where the riprapping is needed. I think there is a little now at that corner, but not enough to do any good. The riprapping now there is a kind of pavement put there to protect the pier, and there has evidently been more there, for it looks as if it had been washed off or sunk in the ground. I do not know how much of that riprapping would be required to protect the pier. It is good as far as it extends, but I don't know how far it extends. So far as I know, there has been none except what is visible. There are some stone built out upon the corner next the river, the undermined portion. On the side next the river there is just loose stone.
57 There is sand lying over and among the stones. I never observed the operation of the current or eddy upon that part of

the pier, and don't know how the water strikes it. I think it is protected by the abutment of the bridge on the north. Sand is deposited between the stones. Paving around the pier would do as well as or better than the riprapping if the pavement wasn't very deep and if the pavement was laid right. Ohio street ought to go three feet 6 inches further south than claimed by defendant.

On redirect examination the witness testified:

I think the defendant, in order to properly protect the guy pier in question, should have riprapping which would go up onto the pier at least six feet from the foundation of sand where it rests; in that case there ought to be eight or ten feet at the base. I should say that ten feet would be sufficient, provided nothing would be in the way to prevent it from protecting it, and there ought to be ten feet in all directions all around the pier. The riprapping now there would answer for such work as far as it goes, but it is not of the size I should have made for a bridge of that kind and a current of that sort. I should think it should be of large stones and much wider at the base. There is always more or less of an eddy around the pier at high water, and when the water of the Ohio river is very high there is a good deal of drift unless there has been a freshet recently before.

The defendant also introduced a witness, JOSEPH LAWSON, who testified as follows:

*Testimony of Joseph Lawson.*

I am secretary of the defendant company and have been since 1865, and the superintendent of its bridges, my duties being to look after the repairs of the bridge and toll-keepers. The bridge was reconstructed in 1871, and again in 1887, from plans furnished by Mr. Hildenbrand. The guy pier on the island side south of the bridge has been there ever since I have been connected with the defendant. It is used to attach the guys to it to stiffen the bridge against
58 storms or wind. Since I have been connected with the defendant company I have made suspension bridges something of a study. I think the guys are necessary, and that the pier is necessary to attach the guys to it. Around this guy pier there is stone on the south side upon the stream or river side and south of that, and there is filling and stone on the land side—loose wall without cement or mortar. The prevailing winds that give most trouble to the defendant's bridge come from the southwest—the direction of these guys. The southeast and southwest winds affect the bridge most, but it is also affected by winds from the north when they are heavy. There is a guy pier on the north side of the bridge also, and guys on the north and south at the eastern end of the bridge. When the river is high the water washes around the guy pier south of the western end of the bridge, and I had part of the riprapping on the lower side put there; part of it was there when I came, and I had more put in afterwards to prevent washing out; it washed out

from around the guy pier. The last riprapping was put there after the flood of 1884. There was some but I put more there. The guy pier was dug out a great deal by this flood. I also put a post in after the flood of 1884 to fasten the guys to. The post spoken of is not imbedded in the masonry of the pier, but is put in the rear of the pier and against the pier. There are stone built around and under it to support it, and a brace against the post to keep it from falling over. The guy pier also acts as a brace to keep it from falling over. It is supported by the riprapping. I first heard of a new bridge being contemplated in this neighborhood within the last year or two. No changes have been in this guy pier since I heard of it, and the defendant's ground has not been put to any other use than it was accustomed to be put to before. The land proposed to be taken has been used for bridge purposes and for a guy pier. I have been piling lumber on it; it is where I put a great deal of stuff for the bridge in 1887. Before the bridge company purchased the property it belonged to Mr. Hornbrook. The bridge company used the
59 property in 1872 and '73, and after that when they needed it until it made the purchase. We used it under a verbal arrangement with Mr. Hornbrook in consideration of allowing him and his wife to use the bridge without toll. We use the property more fully now than we did then. Before purchas- it I put certain materials on it which I could not put on the main anchorages of the bridge. These anchors were used for piling lumber on them, and this was very inconvenient to the people who used the bridge, and after we bought the property the lumber was piled there. As to the riprapping about the guy pier, I wouldn't like to do without that. It would be very hard to do without it, unless there would be something put there instead of the riprapping. With reference to my telling the surveyors employed by the bridge company that they should not survey the line from the middle of the abutment of the bridge down to what is now Ohio street, I have to say that the river was up when we wanted the survey made, and the reason for wanting the survey was the papers that came into my hands as secretary from the board of managers didn't give any distance between the guy pier and the piece of land they wanted. The object was to find where the corner of the street was. The surveyors said from South Front street was the way of getting the line. I agreed with them that that might be, but there might not be an agreement of the other point to come to it had the river been down, and I asked Mr. Clarke, one of the defendant's attorneys, and he said it was the line of the street with our property line that was wanted; so that is the way we come to get the line of the street. I told the surveyors then it wasn't necessary ts get the line from the bridge abutment if we got the line of the street. The height of the river caused some delay in getting the survey. We could not get down to the guy pier to measure it, as the water was up around it. Mr. Clarke said it wasn't necessary to get the line from the bridge abutment down; that it was the other line we would need. I didn't have any idea at that time that it was necessary to have the line from the abutment

in order to get the line of the street. The defendant's
60 bridge has some repairing done to it every year. We have no place for piling lumber except the property bought from Mr. Hornbrook, which extends from the abutment of the bridge down to Ohio street. The part next to Ohio street is the high ground. I cannot use the lower part next to the bridge on account of the water coming up on it. The land proposed to be taken in this proceeding is high ground. I always thought it necessary to the defendant and so advised before the purchase of it. The purpose of purchasing the piece of ground of Mr. Hornbrook was that we needed the ground for repairing purposes for our bridge. I could get along without it by making platforms or by piling the lumber on the anchorages or by getting some other place. Piling lumber on the anchorages is inconvenient, because in putting the lumber there and taking it away it is necessary to block the sidewalks and wagon-ways leading to the bridge, and thus impede travel. The anchorages of the bridge are on both sides of the roadway leading to the bridge and are sixty or seventy feet long by ten feet wide.

On cross-examination the witness testified:

The talk about the twenty-five feet proposed to be taken being necessary because we wanted to pile lumber on it is not nonsense. If I don't have that I have to get some other place. There would be difficulty about getting another place. At times we have twenty-five to thirty-six thousand feet of lumber. I don't know how much we have now. We have somewhere between twenty-five, thirty, and forty thousand feet. To pile this lumber would take a piece of land about seventy feet long and twenty wide. The lumber that we have now is forty feet long, parts of it. I don't think there is any place on the defendant's land outside of the twenty-five feet where this lumber could be piled on high ground or ground as high as that proposed to be taken. Outside of this 25 feet I don't think there is 25 feet more in length high enough to pile lumber on. There is other ground on which I have piled lumber, but I had to put material under it to raise it up. I could do that again if I was forced to. It was very inconvenient before.
61 There is of the other ground a space about sixteen feet by sixty or fifty, but it is not as high as the ground proposed to be taken.

The petitioner then put to the witness this question: "This 16 x 60 feet of ground you would feel reasonably safe in piling lumber on?" To the asking of which question the defendant objected, but the court overruled its objection and allowed the question to be asked, which was done, and the defendant excepted. In answer to this question the witness replied: "Not without some understanding."

Continuing, the witness testified: Some of the lumber that is on the twenty-five feet proposed to be taken is raised up by underpinning.

The following questions and answers were then put and made:

Question. I ask you what you have outside of that 25 feet that you would be reasonably safe in piling on.

Answer. The safest would be between that and the bridge.

Question. How much?

Answer. I don't know. I didn't measure it.

Question. You can give us some idea, can't you?

Answer. To take it in sixteen and twenty feet widths I don't think I have over thirty feet long.

Question. Did you say twenty feet long by twenty wide?

Answer. No, sir.

Question. Have you got that much? Did you underpin any lumber that you stuck on 25 feet on this 25 ft. piece?

Answer. Yes, sir.

Question. If you would underpin and raise it, how much high ground would you have to put lumber on?

Answer. It reaches over the high ground.

Question. How much ground have you outside of the 25 ft. to pile lumber on if you underpin it the same as the 25 feet?

Answer. I don't know how much.

Q. You have more than twenty feet?

Answer. I don't think I have.

62 Continuing, the witness testified: Lumber can't be piled on the bridge anchors more than twelve feet high without danger of the blowing off in a storm. I suppose we could pile 30,000 feet in the anchorages without impeding travel, but not without great inconvenience in getting it up to the anchorage. I think the stone piled around the guy pier is riprapping of a certain kind. It is not of the best. It is a very poor kind, but not the next thing to no riprapping at all. I put some heavy stone around the post to support it, to keep it from pushing out. Then it is riprapped over with heavy stone. There is also a brace holding the post to the top of the anchorage. In the flood of 1884 the old post was broken off by the drift; the guys were also broken off. We had to cut those that were broken off on that side. When a flood comes and brings drift I have to cut the guys loose, though not in an ordinary flood. If a flood would come somewhere near to the floor of the bridge I would cut them off. Such a flood would take the guys and perhaps the bridge, too, if houses were washed down against the bridge. If such a flood came and the guys were broken and the post carried away the pier would be of no use if these occurrences would happen all at once. If the post should be broken and the guys still remained attached to it they would still be of use in steadying the bridge in high wind. In that case the other two guys attached to the masonry would have more to do and the tendency of the pier to be undermined toward the bridge would be increased. It is undermined some now on the side toward the bridge. I don't know whether the strain of the guys had anything to do with that. The reason for fastening the guys to the top of the post was to elevate them above the guy pier so as to keep them out of the reach of drift coming down

with the water. I think I had some guys carried to the top of the pier and the drift broke them. I didn't say that the line from the abutment of the bridge down to the line of Ohio street was not measured because the water was too high. The reason was that Mr. Clarke said it wasn't necessary; that it was the line of Ohio
63 street we wanted. Mr. Hoge was in the act of measuring that line when I told him we didn't want it. At that time it could have been measured well enough. I told them not to measure it and if they were asked about it to say that they hadn't measured it because we didn't want it done. Mr. Walter Smith told me after the occurrence spoken of and before the trial commenced that this was an important line. At that time I didn't tell him not to get the line. I didn't tell Mr. Clarke that Mr. Smith had told me that the line was an important one. At the time I told the surveyors not to measure the line I don't remember whether I knew or not that the defendant's deed called for the north line of Ohio street extended. I did know that afterwards.

The counsel for the petitioner thereupon then asked the witness this question: "Did you ever take sand from the outside of this pier and sell it?" To the asking of which question the defendant objected, but the court overruled its objection and allowed the question to be asked, which was done, and the defendant excepted. Thereupon the witness answered: "No, sir; not from the pier." The petitioner's counsel then asked this question: "Did you sell sand that was taken from the river side of the pier?" To the asking of which question the defendant objected, but the court overruled its objection and allowed the question to be asked, which was done, and the defendant excepted. To this question the witness answered: "From around this pier? I don't allow sand to be taken from it. I allow it to be taken from out next the river, but not next the pier, though I do allow it to be taken from between the pier and the river when the river is down to a certain stage."

Continuing, the witness testified:

"We took sand out there and sold it. I don't think there has been any sand taken away from there within twenty feet of the pier. On a piece of land 20 x 70 feet 84,000 feet of lumber could be piled, making the pile ten feet high and the spaces between the lumber being equal to the thickness of the lumber, if the calculation is made without regard to the different lengths and thicknesses of lumber."

64 On redirect examination the witness testified:

Some of the lumber we use is 8 x 6, 8 x 10, 4 x 8, 3 x 11, and 2 x 8, and some is 4 x 6, and I think some 5 x 9 for the bridge. The principal part of the lumber now on the ground is flooring lumber. The heavy timbers constitute the largest part of the lumber used for the bridge. There are not many of them there at present. I usually pile the lumber from five to six feet high. The higher it is piled the more expensive it is. The lumber now on the ground is what is used for ordinary repairs. In making extraordinary re-

pairs we have had as much as 130,000 feet of lumber at one time. Some of this we left where we bought it until we needed it, and some of it we piled on this ground. We did not use all the ground suitable for piling lumber, because we had workmen working on part of it so as to keep from interrupting traffic on the bridge.

The defendant thereupon rested its case, and at the instance of the defendant the jury went to view the property in controversy, and on their return the petitioner introduced a witness, D. M. CARY, who testified as follows:

*Testimony of D. M. Cary.*

My business is contracting for railroad and bridge work. I have contracted for a great many bridges in my time, and have built masonry work ever since 1868. I have had a great deal of experience in building foundations of piers for bridges. I have seen the defendant's guy pier on the south of the west end of its suspension bridge. I saw it yesterday afternoon and some stone around it. The stone lie around loose; some of them close up to the pier and some not. I don't know how much use they are. They don't look to me as if they are but very little use, and the foundation of the pier is undermined. The stone lie around loose under the pier, which is undermined. At the lower end there is some stone there that is not washed out. It is paved with stone and sand. It looks as if the washing is on the face and upper corner—from the location of the anchorage east of the pier. I don't know what use the
65 stone is around and against the post. If there is enough there it would act as an anchorage and hold it there. It is not any better for that purpose than the ground.

On cross-examination the witness testified:

Earth would wash more than stone. If the stone are heavier than the earth it would make a difference. Stone is heavier than earth if there is enough of them. I didn't see enough of them to know whether they are heavier than earth or not. The same amount of stone is heavier than the like amount of earth. The stone would hold the post better than that much earth would—better than that lying around loose. To pack earth that is down around the post it is better than the same amount of stone lying around loose. If the earth was put in first and stone on top, the stone would help keep the post down. If the stone is put in loose it would not hold the post beyond the weight of the stone. One cobble-stone would do something to hold the post down. It is only a question whether there is enough stone there to hold the post down. I don't know whether there should be more stone or not. I only saw some on the surface; I didn't see many. I don't know whether there were enough or not. All I could see wasn't enough to do much good. There should be, in order to do any good, more stone there than I saw; how much would depend upon the strain upon the guys. I don't know how much it would take. I don't know whether what I saw would be enough or not. There is not enough if there is a strain on the

guys. I don't know whether there was a strain on the guy. If there was a strain on the guy it would draw the pier over on one side. The witness was then asked, "Should there be riprapping there?" and answered, "Yes, sir; or something done to it."

Continuing, he testified: "If I was going to do anything with the guy pier I would build a new one with new masonry at the bottom. I would build it in with masonry and not put in any riprapping. We don't put riprapping around masonry to hold it. I don't call to mind having seen at any other place riprapping put around
66 a pier where it was built above the surface of the water. I don't know what the object of the riprapping would be in a situation such as this. The only place I have been accustomed to put riprapping is on the edge of a bank to keep it from washing out and not to keep masonry from washing. I don't think riprapping is any good to protect masonry. I never saw it tried; that is my opinion. The pier has no foundation of masonry. I only saw rubble foundations. I didn't sound to see whether there were other foundations. At the lower end of the piers there was a deposit of sand over everything. I could not tell how much the riprapping had protected it from washing. For all I know, that might have been the reason the lower corner hadn't washed.

The defendant next introduced a witness, GILMER BROWN, who testified as follows:

*Testimony of Gilmer Brown.*

I have been a civil engineer since 1877. My particular work for the last seven or eight years has been in connection with the construction of bridges. I was assistant resident engineer on the St. John cantilever bridge in Canada from 1883 to 1885, where the piers were in and over a very swift current in times of high water. We had two piers in the water. I have also had experience with other bridges. I have recently seen the guy pier on the west end of the defendant's bridge. I saw a few stones not connected with the pier. There seemed to be a number of stones thrown down there. Whether they were put there by hand or not I couldn't say. In my opinion, those stones are of no use in connection with that pier.

On cross-examination the witness testified as follows:

When I say that I couldn't tell whether the stone were put there by hand or not I mean they possibly may have rolled down the hill or bank. The river bank there has a slope up from the pier to the street. I have never heard of any stone being found on the hill, but I suppose that such a thing is possible as stone being put there in around that pier. I don't know whether they were put there
67 or were thrown there by boys. I don't know whether it would be possible for boys to throw them there. I saw some stones which a boy could throw. I suppose the stones were put there, but whether they were put there for the protection of the pier or not I couldn't say; if they were not mere refuse left over after the build-

ing of the pier, but were put there, I could not suggest any reason for putting them there except to protect the abutment. I don't know which was the largest. I don't know how large the stones were; they were ordinary stone; at a guess, the largest was about as big as a piece of chalk; they were various sizes; some larger and some smaller. I don't know which was the largest. I couldn't say whether the largest was three feet long or four feet or two feet or one foot. I suppose there were some there that would measure one foot. I don't know whether there was some as large as three feet; some were larger than others; they were of no use for the protection of the pier, in my judgment. I could say that without saying about the size of the stone; it would depend upon the weight and size of the stone; if I were to protect the pier as it is, if I were to deposit riprapping and stone there, I would put stone at the other side of the pier, nearer the river, and in a very different shape from the way in which they are now; much different quantity, larger quantity, on the corner nearest the bridge and the river. I would put riprapping there if I would protect the pier with riprapping. I don't know whether it could be properly protected with riprapping or not. I don't think the pier in its first construction was good; it might be made better than it is at present by depositing all the stone where the stone is wanted. I don't know that I would deposit any there against the pier. I cannot say how far it would extend to do it properly; that would depend upon the bed of the river. I didn't study it with that in view. I studied it with a view of seeing whether the stone would or would not be of any sufficiency and not with a view of seeing what would be proper to put there. My first object was to see whether the pier was protected and to see if the
68 stone about it were of any value for any protection. I don't think any riprapping is necessary on the south side; of course, I could not say, but that is my opinion. I have looked into the question sufficiently to have an opinion on which I could rely; if I was in charge of the bridge I think I would be justified in taking the stone that is now there away from the south without putting anything in place of it. I don't think it would hurt the pier. I did not see the river at its height, but looking at the river as it is, with the water close to the foot of the pier, but with no water touching the pier, I saw no eddy. I never saw the pier until yesterday, and never saw the pier with water around it. Without knowing how the currents are when the pier is surrounded with water, I would be willing to take the stone away. I don't think it would wash at the south; there is very little evidence of washing there; if the stone hadn't been there I don't know what would happen. I don't think anything would have happened. I think the earth around the pier would have been the same height without the stone. I don't think there is enough stone there to have any effect. I don't think their removal would have any effect on the pier. I didn't examine right south of the pier to know whether it had been washed or not, or whether there was the natural formation still there I couldn't say, or whether the stone south of the pier had been put there after the earth had been washed away. I don't know whether there were any

stone under the stone which I saw on the surface; if I were to protect the pier with riprapping I would put it around in different places. I don't know how much I would put around the pier because I don't know the character of the river. You might roll the stone in there that would roll away, but you don't know how much riprapping to put in until you try to put it there. We would put stone in until we were satisfied we had enough riprapping. We would tell that by watching the current of the river and knowing that we have put in as much as is of any use. There has been washing at the north side of the pier, where there is no stone, and no washing at the south side, where there is stone, but I don't think the stone had any effect upon that.

69 The petitioner then introduced evidence tending to show that the true north line of Ohio street south of the defendant's guy pier was three feet and ten inches farther south than the line as claimed by the defendant, and ran 28 ft. 4 in. from the masonry of the guy pier, measuring from the southernmost extremity of that masonry to the nearest point on the line of Ohio street as thus located.

Thereupon, the foregoing being all the evidence introduced in the cause, the petitioner moved the court to give the following instruction—that is to say, lands owned by one internal improvement company are not thereby exempted from being taken, and if such lands are not necessary for the enjoyment of the franchise of such company they may be taken for the purpose of another internal improvement company in the same manner as lands owned by others.

To the giving of which instruction the defendant objected, but the court overruled its objection and gave the said instruction to the jury, and the defendant excepted.

The court also gave, at the instance of the defendant, the three instructions next following:

1. When one corporation formed for the purpose of prosecuting a work of internal improvement, such as the plaintiff company, seeks to take by condemnation property belonging to another similar corporation, such as the defendant bridge company, the plaintiff must show that the property to be taken is necessary to be used by it in the prosecution of its undertaking. But if in such case it appear that there is a like necessity for the defendant to use the property in the prosecution or conduct of its undertaking, then the possession of the defendant will prevail and it will be allowed to retain the property, nothwithstanding it may be necessary for the plaintiff's undertaking. If, therefore, the jury find from the evidence that any part of the defendant's property sought to be taken in this proceeding is necessary for the defendant to use in the maintaining and proper securing of its bridge, they shall as to such part find for the defendant.

70 2. If the plaintiff succeeds in this proceeding in condemning any portion of the defendant's land the plaintiff will acquire the absolute, entire, and exclusive ownership of the portion so condemned, and the defendant will thereafter have no rights of

any kind in such portion and no right to use the same for maintaining thereon its pier, its riprap, or for passing to and from the same from Ohio street or for any other purpose.

10. The defendant is not bound for the accommodation of the plaintiff to remove its guy pier or riprap to some other place on its own or other land, and the jury must determine the question of the necessity to the defendant of the land proposed to be taken without regard to the possibility of such removal.

And the defendant thereupon moved the court to give to the jury seven other instructions in the following words—that is to say:

3. In the absence of bad faith, a corporation formed for the prosecution of a work of internal improvement, such as the defendant, is permitted by the law to be the judge of the necessity for its taking or retaining property for its use. If, therefore, the jury find from the evidence that the defendant in good faith has used and is using for its guy pier and riprap a portion of the property here sought to be condemned, then the jury should also find that such portion is necessary to the proper exercise of the franchise of the defendant, and should find for the defendant as to such portion.

4. In the absence of bad faith, a corporation formed for the prosecution of a work of internal improvement, such as the defendant, is permitted by the law to be the judge of the necessity for its taking or retaining property for its use. If, therefore, the jury find from the evidence that the defendant in good faith has used and is using for piling lumber used by it in making repairs to its bridge a portion of the property here sought to be condemned, then the jury should also find that such portion is necessary to the proper exercise of the franchise of the defendant, and should find for the defendant as to such portion.

71 5. Where it is said that property must be necessary for the proper exercise of the franchise of the defendant in order to be retained by it against the plaintiff's claim in this proceeding it is not intended that the land must be so absolutely necessary as that without it it would be altogether impossible for the defendant to maintain or use its bridge, but only that the land is such that in the exercise in good faith of a reasonable discretion it is proper for the defendant to use the property in the course of the exercise of its franchises. If, therefore, the jury find from the evidence that a portion of the property sought to be taken in this proceeding is in good faith in use by the defendant for its guy pier or for its riprap, and if they further find that use is such as it is proper for the defendant in the exercise of a reasonable discretion to make of such portion in the course of the exercise of its franchise, then the jury should find for the defendant as to such portion.

6. When it is said that property must be necessary for the proper exercise of the franchise of the defendant in order to be retained by it against the plaintiff's claim in this proceeding it is not intended that the land must be absolutely necessary as that without it it would be altogether impossible for the defendant to maintain or use its bridge, but only that the land is such that in the exercise in good faith of a reasonable discretion it is proper for the defendant to use

the property in the course of the exercise of its franchise. If, therefore, the jury find from the evidence that a portion of the property sought to be taken in this proceeding is in good faith in use by the defendant for piling lumber used by it in making repairs to its bridge, and if they further find that use is such as it is proper for the defendant in the exercise of a reasonable discretion to make of such portion in the course of the exercise of its franchise, then the jury should find for the defendant as to such portion.

7. The defendant is not bound for the accommodation of the plaintiff to provide itself with other space, either upon its own
72 or other land, for piling the lumber which it may now pile on the land proposed to be taken. If, therefore, the jury find from the evidence that the defendant uses for piling lumber used for repairing its bridge a portion of the land sought to be taken in this proceeding the jury shall not, in determining the necessity of that portion to the defendant, consider the possibility of the defendant's providing itself with other space, either upon its own or other land, for that use, but shall determine the question of necessity as though no other space than that now used could be obtained for the purpose.

8. In order that the defendant may retain a portion of the property sought to be taken in this proceeding it is not requisite that such part should be in actual use by the defendant if it is necessary to the proper maintaining or securing of its bridge. If, therefore, the jury find from the evidence that a portion thereof ten feet or less width on all sides of the defendant's guy pier is necessary to the proper maintaining of said guy pier and of the defendant's bridge, then as to such portion they shall find for the defendant, although the whole of the said portion may not be occupied by the defendant's riprap.

9. If the jury find from the evidence that any part of the defendant's guy pier or riprap is on the land sought to be taken in this proceeding, and if they further find from the evidence that the said guy pier and riprap are actually and in good faith in use by the defendant, and that they are necessary to the proper exercise of the franchise of the defendant, then the jury shall find for the defendant as to the whole parcel sought to be taken.

To the giving of which instructions the petitioner objected, and the court refused to give the said instructions, and thereupon the defendant excepted with reference to the refusal to the court's action upon each instruction.

The defendant also moved the court to require the jury to answer each of the following questions in writing:

1. Does the strip of land proposed to be taken in these proceedings include any part of the defendant's guy pier?
73 2. Does the strip of land proposed to be taken include any part of the defendant's riprap?

3. If any, how much of the defendant's guy pier is on the strip of land proposed to be taken in these proceedings?

4. If any, how much of the defendant's riprap is on the strip of land proposed to be taken in these proceedings?

5. Were the defendant's guy pier and riprap in good faith placed in their present position before the plaintiff's project of building a bridge was known?

6. Is the defendant's use of its land for a guy pier and riprap a use which it is reasonably proper for the defendant in exercising its franchise to make of the land occupied by those structures?

But the court refused to require the jury to answer any of the said questions, and the defendant again excepted. And the jury having brought in a verdict as in this record is hereinbefore set forth, the defendant moved the court to set aside the verdict and to grant it a new trial of the said issues, but the court overruled its motion and proceeded to enter up an order upon the verdict, and the defendant again excepted and tendered this its bill of exceptions and asked that the same might be signed and sealed and made a part of the record, which is now accordingly done.

JOSEPH R. PAULL, *Judge, &c.* [SEAL.]

STATE OF WEST VIRGINIA, }
*Ohio County,* } *sct:*

I, John W. Mitchell, clerk of the circuit court for Ohio county, West Virginia, certify that the foregoing is a true copy of the record and papers in the proceeding wherein The Wheeling Bridge Company is petitioner and The Wheeling and Belmont Bridge Company is defendant as the same appears in my said office.

Given under my hand this 5th day of May, 1890.

JOHN W. MITCHELL, *Clerk.*

(Cost of record, $——.)
(Record printed May 19th, 1890.)
(Printer's fee for petition, record, index, and cover, $54.50.)

74 THE WHEELING BRIDGE COMPANY, D. E., }
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY, P. E. }

Opinion by LUCAS, *J.*

*Syllabus.*

1.

Long after the license and establishment of a ferry the Legislature, by general law, provided that the county courts should not license a ferry within a half mile in a direct line of one already established: Held, this general law, so far as it applied to such existing ferry, did not create in it the right to a perpetual monopoly, but was repealable at the will of the Legislature.

2.

The purchase of said ferry by the Wheeling and Belmont Bridge Company under an enabling act authorizing them to make the purchase could not enlarge nor add to the ferry franchise or

the property in the course of the exercise of its franchise. If, therefore, the jury find from the evidence that a portion of the property sought to be taken in this proceeding is in good faith in use by the defendant for piling lumber used by it in making repairs to its bridge, and if they further find that use is such as it is proper for the defendant in the exercise of a reasonable discretion to make of such portion in the course of the exercise of its franchise, then the jury should find for the defendant as to such portion.

7. The defendant is not bound for the accommodation of the plaintiff to provide itself with other space, either upon its own
72 or other land, for piling the lumber which it may now pile on the land proposed to be taken. If, therefore, the jury find from the evidence that the defendant uses for piling lumber used for repairing its bridge a portion of the land sought to be taken in this proceeding the jury shall not, in determining the necessity of that portion to the defendant, consider the possibility of the defendant's providing itself with other space, either upon its own or other land, for that use, but shall determine the question of necessity as though no other space than that now used could be obtained for the purpose.

8. In order that the defendant may retain a portion of the property sought to be taken in this proceeding it is not requisite that such part should be in actual use by the defendant if it is necessary to the proper maintaining or securing of its bridge. If, therefore, the jury find from the evidence that a portion thereof ten feet or less width on all sides of the defendant's guy pier is necessary to the proper maintaining of said guy pier and of the defendant's bridge, then as to such portion they shall find for the defendant, although the whole of the said portion may not be occupied by the defendant's riprap.

9. If the jury find from the evidence that any part of the defendant's guy pier or riprap is on the land sought to be taken in this proceeding, and if they further find from the evidence that the said guy pier and riprap are actually and in good faith in use by the defendant, and that they are necessary to the proper exercise of the franchise of the defendant, then the jury shall find for the defendant as to the whole parcel sought to be taken.

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4. If any, how much of the defendant's riprap is on the strip of land proposed to be taken in these proceedings?

5. Were the defendant's guy pier and riprap in good faith placed in their present position before the plaintiff's project of building a bridge was known?

6. Is the defendant's use of its land for a guy pier and riprap a use which it is reasonably proper for the defendant in exercising its franchise to make of the land occupied by those structures?

But the court refused to require the jury to answer any of the said questions, and the defendant again excepted. And the jury having brought in a verdict as in this record is hereinbefore set forth, the defendant moved the court to set aside the verdict and to grant it a new trial of the said issues, but the court overruled its motion and proceeded to enter up an order upon the verdict, and the defendant again excepted and tendered this its bill of exceptions and asked that the same might be signed and sealed and made a part of the record, which is now accordingly done.

JOSEPH R. PAULL, *Judge, &c.* [SEAL.]

STATE OF WEST VIRGINIA, *Ohio County,* } *sct:*

I, John W. Mitchell, clerk of the circuit court for Ohio county, West Virginia, certify that the foregoing is a true copy of the record and papers in the proceeding wherein The Wheeling Bridge Company is petitioner and The Wheeling and Belmont Bridge Company is defendant as the same appears in my said office.

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2.

The purchase of said ferry by the Wheeling and Belmont Bridge Company under an enabling act authorizing them to make the purchase could not enlarge nor add to the ferry franchise or

privileges nor convert said monopolistic feature into an irrevocable perpetuity in the hands of the vendee, but left it subject to repeal just as it was held by the vendor; and the Legislature having repealed it by general law the W. and B. Bridge Co. have no right to complain, and a new bridge may be erected within the restricted territory without any violation of vested rights.

3.

One internal improvement company may in the exercise of eminent domain take the real estate of another internal improvement company in the same manner and generally under the same conditions that it may take the lands owned by others, provided the lands proposed to be taken are not necessary to the enjoy-
75 ment of its franchise by the defendant company; nor will any mere trivial or temporary use by the defendant company be sufficient to protect its land from such condemnation and appropriation.

4.

Where there is sufficient evidence to support the hypotheses of an instruction and it correctly propounds the law and is otherwise unobjectionable it is error to refuse it; but if this court sees plainly from the record that the party offering the instruction has not been injured by its rejection the verdict of the jury will not be disturbed on account of the court's refusal to grant it.

5.

Submitting to the jury under our statute "particular questions of fact" is within the discretion of the trial court, subject to review; but it is not erroneous to refuse to permit such questions to be propounded when they are immaterial or irrelevant, and unless the answers thereto, if contrary to the general verdict, would control the same and be conclusive of the issue.

6.

Motions to exclude the plaintiff's evidence or to set aside a verdict on the ground that it is contrary to the evidence ought to be overruled when the court cannot grant the same without usurping the functions of the jury.

76 THE WHEELING BRIDGE CO.
*v.*
THE WHEELING & BELMONT BRIDGE CO.

The Wheeling Bridge Company petitioned the circuit court of Ohio county to condemn, for the purpose of constructing its bridge, twenty-five feet of river front of the Ohio river opposite the city of Wheeling on what is known as the island or Zane's Island.

The Belmont and Wheeling Bridge Company, an ancient corporation, owning and operating a bridge between said island and the city of Wheeling, was the owner of this strip of twenty-five feet,

and as condemnee resisted the application to condemn, and the hearing was set for the 21st day of February, 1890.

The defendant company filed seven pleas, of which three, the 5th, 6th, and 7th, were, on motion, rejected, and have been incorporated in the record and made the subject of exception.

These three rejected pleas are as follows:

"*Plea No. 5.*

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceeding to condemn land.

The said defendant, for further plea, says that it is a corporation organized under a charter granted by the State of Virginia for the purpose of authorizing the defendant to erect a bridge across the Ohio river at or near the town of Wheeling, and that in pursuance of said charter and the powers and authorities from time to time granted and confirmed by the said Legislature of the said State the said defendant erected and has for many years maintained for public use, in consideration of the tolls lawfully exacted by the said defendant, a wire suspension bridge extending from the eastern shore of the said river at Tenth street, in the said town or city of Wheeling, to the eastern shore of Zane's or Wheeling Island at Virginia street, on said Island. And the defendant says that by the acts of
77 the said Legislature the said defendant was empowered to purchase, acquire, and hold all ferry rights and privileges between Zane's Island and the main Virginia shore at the city of Wheeling. And the said defendant says that in the year 1847 there was and for many years had been at the city of Wheeling, between Zane's Island and the main Virginia shore, a ferry duly and lawfully maintained and owned by Henry Moore, trustee; Daniel Zane, and Daniel C. List, trustee, together with the rights and privileges by law incident thereto, and that on the 20th day of September, in the year 1847, the said defendant, under the authority aforesaid, acquired by purchase and conveyance from the said Henry Moore, trustee; Daniel Zane, and Daniel C. List, trustee, the said ferry and the said rights and privileges, and that the said defendant has since owned and enjoyed the same. And the said defendant says that its said toll bridge was erected and has since been maintained substantially in the location of said ferry, and that the said defendant, by maintaining its said bridge for the use of the public as aforesaid and otherwise, has maintained in full force and vigor the rights and privileges appertaining to the said ferry as aforesaid.

And the said defendant says that at the time when it acquired the said ferry and the said rights and privileges as aforesaid one of the rights, franchises, and privileges incident to the said ferry and the ownership thereof was the exclusive right to transport persons,

animals, and vehicles across the said Ohio river within the limits of one-half mile of said ferry, and that the said defendant acquired the said last-mentioned right, franchise, and privileges by means of the said conveyance from the said Henry Moore, trustee, and has since owned and still owns the same. And the said defendant says that the said bridge so proposed to be built by the petitioner, as in the said petition set forth, is intended by the petitioner to be
78 located and the whole of the said parcel of land in the petition mentioned and proposed to be condemned is situated within a half mile of the location of the said ferry and of the location of the said defendant's bridge. And the said defendant says that the said bridge so proposed to be built by the said petitioner as aforesaid is intended by the petitioner to be a bridge for the transportation of persons, animals, and vehicles across the said river. And so the defendant says that the said petitioner has no right to build the said bridge so proposed to be built by it as aforesaid, and that its proceeding to condemn the said parcel of land of the said defendant is without authority of law; and this the said defendant is ready to verify. Wherefore it prays judgment whether the said petitioner ought to have or maintained its proceeding against it.

A. J. CLARKE AND
HENRY M. RUSSELL,
*Attorneys for Defendant.*"

*Plea No. 6.*

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceeding to condemn land.

The said defendant, for further plea, says that it is a corporation organized under a charter granted by the State of Virginia for the purpose of authorizing the defendant to erect a bridge across the Ohio river at or near the town of Wheeling, and that in pursuance of the said charter and the powers and authorities from time to time granted and confirmed by the Legislature of the said State the said defendant erected and has for many years maintained for public use, in consideration of the tolls lawfully exacted by said defendant, a wire suspension bridge extending from the eastern shore of the said river *to* Tenth street, in the said town or city of Wheel-
79 ing, to the eastern shore of Zane's or Wheeling Island, at Virginia street, on said island. And the said defendant says that by the acts of the said Legislature the said defendant was empowered to purchase, acquire, and hold all ferry rights and privileges between Zane's Island and the main Virginia shore at the city of Wheeling. And the said defendant says that in the year 1847 there was and for many years had been at the city of Wheeling, between Zane's Island and the main Virginia shore, a ferry duly and law-

fully maintained and owned by Henry Moore, trustee; Daniel Zane, and Daniel C. List, trustee, together with the rights and privileges by law incident thereto, and that on the 20th day of September, in the year 1847, the said defendant, under the authority aforesaid, acquired by purchase and conveyance from the said Henry Moore, trustee; Daniel Zane, and Daniel C. List, trustee, the said ferry and the said rights and privileges, and that the defendant has since owned and enjoyed the same. And the said defendant says that its said toll bridge was erected and has since been maintained substantially in the location of the said ferry, and that the said defendant, by maintaining its said bridge for the use of the public as aforesaid and otherwise, has maintained in full force and vigor the rights and privileges appertaining to the said ferry as aforesaid.

And the said defendant says that at the time when it acquired the said rights and privileges as aforesaid one of the rights, franchises, and privileges incident to the said ferry and the ownership thereof was the exclusive right to transport persons, animals, and vehicles across the said Ohio river within the limits of one-half mile of said ferry, and that the said defendant acquired the said last-mentioned right, franchise, and privileges by means of the said conveyance from the said Henry Moore, trustee; Daniel Zane, and Daniel C. List, trustee, and has since owned and still owns the same. And

80 the said defendant says that the said bridge so proposed to be built by the petitioner, as in the petition set forth, is intended by the petitioner to be located and the whole of the said parcel of land in the petition mentioned and proposed to be condemned is situated within a half mile of the location of the said ferry and of the location of the said defendant's bridge. And the said defendant says that the said bridge so proposed to be built by the said petitioner as aforesaid is intended by the petitioner to be a bridge for the transportation of persons, animals, and vehicles across the said river.

And so the said defendant says that out of the said powers and authorities granted to the said defendant as aforesaid and the acquisition by the said defendant of the said ferry and the said rights, privileges, and franchises arose a contract between the said State of Virginia and the said defendant that the said defendant should have and enjoy during its chartered existence the exclusive privilege of transporting persons, animals, and vehicles across the Ohio river at all points within a half mile of the location of the said ferry, and that upon the formation of the State of West Virginia in the ownership of the Ohio river and its shores became a party to the said contract and bound by the same. Yet the said defendant says that the Legislature of this State, not regarding the obligation of the said contract, on the 25th day of March, in the year 1882, passed an act which provided that corporations might be formed for the purpose, and that when so formed they might erect and maintain toll bridges over the Ohio river for the transportation of persons, vehicles, and other things over the said river, and that no ferry privileges or franchises should preclude the erection of such bridges or entitle the

owner of such privileges or franchises to damages in case of any such bridge.

And the said defendant says that the only authority of law which the said petitioner has or pretends to have for the erection of the bridge so to be erected and maintained by it as aforesaid is the
81 said act of the Legislature of West Virginia. And the said defendant says that the said last-mentioned act is unconstitutional and void as impairing and in so far as the same impairs the obligation of the said contract between the said States of Virginia and West Virginia and the said defendant. And so the defendant says that the said petitioner has no right to build the said bridge so proposed to be built by it as aforesaid, and that its proceeding to condemn the said parcel of land of the said defendant is without authority of law.

Wherefore it prays judgment whether the said petitioner ought to have or maintain its proceeding against it.

A. J. CLARKE AND
HENRY M. RUSSELL,
*Attorneys for Defendant.*

*Plea No. 7.*

In the Circuit Court of Ohio County, *ss:*

WHEELING BRIDGE COMPANY
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY.

Proceeding to condemn land.

The said defendant, for further plea, says that it is a corporation organized under a charter granted by the State of Virginia for the purpose of authorizing the defendant to erect a bridge across the Ohio river at or near the town of Wheeling, and that in pursuance of the said charter and the powers and authorities from time to time granted and confirmed by the Legislature of the said State the said defendant erected and has for many years maintained for public use, in consideration of the tolls lawfully exacted by said defendant, a wire suspension bridge extending from the eastern shore of the said river at Tenth-street, in the said town or city of Wheeling, to the eastern shore of Zane's or Wheeling Island at Virginia street, on said Island.

And the said defendant says that out of the said charter and the said powers and authorities so granted and confirmed and the erection of the said bridge in pursuance thereof arose a contract
82 between the said State of Virginia and the said defendant that the said State would not during the chartered existence of the said defendant authorize or permit any other bridge for the transportation of persons, animals, or vehicles across the Ohio river so near to the said bridge of the said defendant as seriously to impair the value of the defendant's bridge by the diversion therefrom of the travel and tolls which would otherwise naturally flow in that direc-

tion; and the said defendant says that upon the formation of the State of West Virginia this State, as the successor of the State of Virginia in the ownership of the Ohio river and its shores, became a party to the said contract.

And the said defendant says that the bridge so proposed to be erected as aforesaid by the said petitioner is intended to be a bridge for the transportation for toll of persons, animals, and vehicles over the said Ohio river, and that the proposed location thereof and the said parcel of land described in the petition are within five hundred feet of the said bridge of the defendant, and so near the latter that the erection and maintenance of the said proposed bridge of the petitioner will necessarily seriously impair the value of the defendant's bridge by the diversion therefrom of the travel and tolls which would otherwise naturally flow in that direction, and the defendant says that there is no authority of law for the erection of any such bridge by the said petitioner in the said proposed location except a certain pretended authority sought to be derived from certain public acts of the Legislature of the State of West Virginia, and the said defendant says that the said public acts of the said Legislature of West Virginia, in so far as they purport to authorize the said defendant to erect or maintain the said bridge in the said proposed location, impair the obligation of the said contract, and are, as well as the supposed authority sought to be derived from them, unconstitutional and void; and this the said defendant is ready to verify.

83 Wherefore the said defendant prays judgment whether the said petitioner ought to have or maintain the said proceeding against it.

A. J. CLARKE AND
HENRY M. RUSSELL,
*Attorneys for Defendant.*

A jury was empanelled, and upon the defendant's four pleas upon which issue was joined they found separately for the plaintiff, and then rendered a general verdict as follows: "We, the jury, find for the petitioner, The Wheeling Bridge Company, on each and all the issues joined." Thereupon judgment was rendered that there was necessity to condemn the property demanded and commissioners appointed to assess a just compensation to the owners. Proceedings were suspended, however, until a writ of error could be presented to this court.

The first question which arises in this case is upon the rejected pleas. These pleas set up in the defendant company an exclusive right of transporting passengers and freight, whether by a toll or free bridge, across the Ohio at any and all points within one-half mile of their own bridge. The question, therefore, to be considered is whether they (the defendant company) did possess any such monopoly of travel and transportation.

It is conceded in the argument and briefs of counsel that Zane's ferry, which the defendant purchased, was licensed at an early day, when no such exclusive privilege as that claimed was attached to

the franchise. Subsequently (1840) the General Assembly of Virginia, by general law and gratuitously, without further consideration from established ferries and as a bounty or subsidy to them, prohibited the county courts from licensing a ferry within one-half mile in a direct line from an established ferry. This subsidy,
84 so far as it favors existing ferries, was purely gratuitous and as much subject to withdrawal by repeal as any other act of the Legislature designed to encourage a particular branch of industry or improvement.

Zane, as a recipient of a gratuitous bounty, could not complain if the same legislative wisdom which conferred should, upon reasons of public policy, withdraw it. The Wheeling and Belmont Bridge Company was authorized (1847) to purchase his rights, privileges, and franchises, but such purchase could not enlarge or add to them. The idea that such authority to purchase enlarges the estate of the vendor and converts an incidental bounty into a vested right cannot be successfully maintained. None of the authorities relied upon tend to sustain such a proposition, nor even bear upon it. The only new grant which entered into the charter of 1847 was the right to purchase certain ferry privileges, and the authorities relied upon by the counsel for appellant or plaintiff in error go to the point that this grant was a contract and irrevocable, but they do not throw any light upon the question whether this grant did or could enlarge such ferry privileges or render them any more extensive than they were in the hands of the original licensee.

We hold that the grant could have no such effect, and that as the feature of a monopoly, so far as it pertained to Zane's ferry, was no part of his original license or charter, but only an incident derived from a general statute passed long after the date of his franchise said statute, so far as his rights were concerned, was subject to repeal by the Legislature and the monopolistic feature liable to revocation by ordinary legislation. and being of this character in his hands it remained the same in the hands of the vendee, the W. and B. Bridge Company. See Mason *v.* Bridge Co., 17 W. Va., 396, and Wimbish *v.* Sommerville, 7 Grat., 205.

85 The Legislature of 1882 having passed an act repealing the clause in the statute regarding the establishing of ferries, which in Mason *v.* Bridge Co., 17 W. Va., had been construed to prohibit the building of a competing bridge within one-half mile of an established ferry, it follows that the plaintiff in error cannot complain that a new bridge is to be built over the Ohio within one-half mile of its own structure, and its pleas putting that matter in issue as a question of fact were properly rejected.

We come now to consider the instructions.

A general view of the opinion of the court with reference to the relative rights and duties of improvement companies, as to the exercise of the right of condemnation and eminent domain, as between themselves, will greatly facilitate our discussion of the instructions.

All property purchased by a corporation may be presumed to be of some use to it, present or prospective; otherwise it would not have

been purchased; and all such property may be put to some use, however unimportant or temporary.

But to say that every trivial use to which a small portion of its property may be put is to exempt the corporation from its proper subordination to the public welfare and to enable it to arrest the progress of other public improvements is to place in corporate hands a most dangerous power—to restrict competition and encourage monopoly.

The true rule, as it seems to me, is to require corporate property to be held liable to that power of eminent domain which it is itself clothed with delegated authority to exercise, subject, in the main, to like conditions and restrictions. The condemner in this case asks only twenty-five feet of the condemnee, and it is quite apparent that were such condemnation demanded of a private individual no court would hesitate to grant it upon compliance with the statute.

86 A similar compliance on the part of the defendant company ought to have been yielded. If a rule were established that any trivial use or mere convenience not necessary to the exercise and enjoyment of the public franchise could be interposed by one improvement company to head off a competing company and arrest its progress, then these corporations, especially under the more than liberal grants of power which the laws of West Va. confer, would be encouraged to hedge themselves around with all accessible sites, locations, routes, and property necessary to cut off competition

Our law (Code, ch. 52, sec. 7) provides as follows: "Lands owned by one internal improvement company, but not necessary for the enjoyment of its franchise, may be taken for the purposes of another internal improvement company in the same manner as land owned by others, but where such lands are claimed to be necessary to the enjoyment of such franchise the court appointing such freeholders (to ascertain a just compensation) may before proceeding further determine upon a report of such freeholders or otherwise whether such necessity exists."

In the leading case of The B. & O. R. R. Co. *v.* The P. W. & Ky. C. Co., reported in 11th W. Va., it is said on page 856: "The court will take care to see that one railroad company is not materially injured for the benefit of another, and where no such material injury will result the onward march of improvement demands that a great work of internal improvement shall not be impeded by imaginary injury to another corporation."

The instructions granted at the prayer of the defendant company were as follows:

1. When one corporation formed for the purpose of prosecuting a work of internal improvement, such as the pl'f company, seeks to take by condemnation property belonging to another sim-

87 ilar corporation, such as the defendant bridge company, the plaintiff must show that the property to be taken is necessary to be used by it in the prosecution of its undertaking.

But if in such case it appears that there is a like necessity for the defendant to use the property in the prosecution or conduct of its undertaking, then the possession of the defendant will prevail

and it will be allowed to retain the property, notwithstanding it may be necessary for the plaintiff's undertaking. If, therefore, the jury find from the evidence that any part of the defendant's property sought to be taken in this proceeding is necessary for the defendant to use in the maintaining and proper securing of its bridge they shall, as to such part, find for the defendant.

2. If the plaintiff succeeds in this proceeding in condemning any portion of the defendant's land the plaintiff will acquire the absolute, entire, and exclusive ownership of the portion so condemned, and the defendant will thereafter have no rights of any kind in such portion and no right to use the same for maintaining thereon its pier, its riprap, or for passing to and from the same from Ohio street or for any other purpose.

10. The defendant is not bound for the accommodation of the plaintiff to remove this guy pier or riprap to some other place on its own or other land, and the jury must determine the question of the necessity to the defendant of the land proposed to be taken without regard to the possibility of such removal.

The instructions offered by the condemnee and rejected were as follows:

3. In the absence of bad faith a corporation formed for the prosecution of a work of internal improvement, such as the defendant, is permitted by the law to be the judge of the necessity for its taking or retaining property for its use. If, therefore, the jury find from the evidence that the defendant in good faith has used and is
88 using for its guy pier and riprap a portion of the property here sought to be condemned, then the jury should also find that such portion is necessary to the proper exercise of the franchise of the defendant, and should find for the defendant as to such portion.

4. In the absence of bad faith a corporation formed for the prosecution of a work of internal improvement, such as the defendant, is permitted by the law to be the judge of the necessity for its taking or retaining property for its use. If, therefore, the jury find from the evidence that the defendant in good faith has used and is using for piling lumber used by it in making repairs to its bridge a portion of the property here sought to be condemned, then the jury should also find that such portion is necessary to the proper exercise of the franchise of the defendant, and should find for the defendant as to such portion.

5. Where it is said that property must be necessary for the proper exercise of the franchise of the defendant in order to be retained by it against the plaintiff's claim in this proceeding it is not intended that the land must be so absolutely necessary as that without it it would be altogether impossible for the defendant to maintain or use its bridge, but only that the land is such that in the exercise in good faith of a reasonable discretion it is proper for the defendant to use the property in the course of the exercise of its franchises. If, therefore, the jury find from the evidence that a portion of the property sought to be taken in this proceeding is in good faith in use by the defendant for its guy pier or for its riprap, and if they further

find that use is such as it is proper for the defendant in the exercise of a reasonable discretion to make of such portion in the course of the exercise of its franchise, then the jury should find for the defendant as to such portion.

89 6. When it is said that property must be necessary for the proper exercise of the franchise of the defendant in order to be retained by it against the plaintiff's claim in this proceeding it is not intended that the land must be absolutely necessary as that without it it would be altogether impossible for the defendant to maintain or use its bridge, but only that the land is such that in the exercise in good faith of a reasonable discretion it is proper for the defendant to use the property in the course of the exercise of its franchise. If, therefore, the jury find from the evidence that a portion of the property sought to be taken in this proceeding is in good faith in use by the defendant for piling lumber used by it in making repairs to its bridge, and if they further find that use is such as it is proper for the defendant in the exercise of a reasonable discretion to make of such portion in the course of the exercise of its franchise, then the jury should find for the defendant as to such portion.

7. The defendant is not bound for the accommodation of the plaintiff to provide itself with other space, either upon its own or other land, for piling the lumber which it may now pile on the land proposed to be taken. If, therefore, the jury find from the evidence that the defendant uses for piling lumber used for repairing its bridge a portion of the land sought to be taken in this proceeding the jury shall not, in determining the necessity of that portion to the defendant, consider the possibility of the defendant's providing itself with other space either upon its own or other land for that use, but shall determine the question of necessity as though no other space than that now used could be obtained for the purpose.

8. In order that the defendant may retain a portion of the property sought to be taken in this proceeding it is not requisite that such part should be in actual use by the defendant if it is necessary to the proper maintaining or securing of its bridge. If, there-

90 fore, the jury find from the evidence that a portion thereof ten feet or less width on all sides of the defendant's guy pier is necessary to the proper maintaining of such guy pier and of the defendant's bridge, then, as to such portion, they shall find for the defendant, although the whole of the said portion may not be occupied by the defendant's riprap.

9. If the jury find from the evidence that any part of the defendant's guy pier or riprap is on the land sought to be taken in this proceeding, and if they further find from the evidence that the said guy pier and riprap are actually and in good faith in use by the defendant, and that they are necessary to the proper exercise of the franchise of the defendent, then the jury shall find for the defendant as to the whole parcel sought to be taken.

Without going into detailed analysis and consideration of these several instructions, it will be seen that, tested by the general prin-

ciples that we have laid down, all the instructions refused to the defendant below were properly refused except the 8th.

This instruction, as it seems to me, propounds the law correctly and was improperly refused, and if I could see any reason to infer that the defendant was injured by its rejection I would send the case back for a new inquest, with directions to grant this instruction.

It is quite clear that the petitioner could not condemn, and thus become possessed in fee of any part of the defendant's riprapping, which "was necessary to the proper maintaining of the defendant's bridge," and if the jury had not directly passed upon this very point as a question of fact I should be of opinion that the case should go back for reconsideration and new trial. Upon examining the record, however, it will be found that this very matter, the hypothesis which supports the instruction, was submitted to the jury
91 in the fourth plea as follows: "And said defendant says that the said portion of the said parcel sought to be condemned, which is so occupied by the said pier and the said supports, is necessary to the proper exercise of the franchise of the defendant, and this the said defendant is ready to verify," and upon the issue made upon this allegation the jury found for the plaintiff. It must be inferred, therefore, that they would not have found and did not "find from the evidence" that any portion of defendant's riprapping which the plaintiff proposed to condemn was necessary to the proper exercise of the franchise of the defendant. It is therefore quite plain from the record that the condemnee was not injured by the refusal to give this instruction, because the jury have found that the premises from which its conclusion was to follow were not true, as a matter of fact. So far as the motion to exclude the condemnor's evidence is concerned, it was properly overruled, since the court could not have sustained it without usurping the functions of the jury, and the same may be said of the motion for a new trial on the ground that the verdict was contrary to the evidence.

It only remains to consider whether the court below erred in refusing to permit certain interrogatories to be propounded to the jury.

These interrogatories were the following:

1. Does the strip of land proposed to be taken in these proceedings include any part of the defendant's guy pier?

2. Does the strip of land proposed to be taken include any part of the defendant's riprap?

3. If any, how much of the defendant's guy pier is on the strip of land proposed to be taken in these proceedings?

4. If any, how much of the defendant's riprap is on the strip of land proposed to be taken in these proceedings?

5. Were the defendant's guy pier and riprap in good faith placed in their present position before the plaintiff's project of build-
92 ing a bridge was known?

6. Is the defendant's use of its land for a guy pier and riprap a use which it is reasonably proper for the defendant in exercising its franchise to make of the land occupied by those structures?

I do not think there was any error in refusing to permit these interrogatories to be propounded. The matter was within the discretion of the circuit court, and we think it was properly exercised. See Code, ch. 131, sec. 5, and Kerr *v.* Lunsford, 31 W. Va., 659.

If every one of these interrogatories had been answered in the defendant's favor they ought not to have affected the general verdict, because the special facts so found would have been entirely consistent with the general verdict. This will manifestly appear by considering the 1st, 2nd, 3rd, 4th, and 5th of these questions in connection with the opinion of the court in B. & O. R. R. Co. *v.* P., W. & Ky. R. R. Co., 17 W. Va., heretofore referred to. It is quite manifest, therefore, that even if the twenty-five feet petitioned for had included portions of the pier and riprapping of defendant, nevertheless they might be condemned, provided such portions were not necessary to the exercise or enjoyment of its franchise by the defendant company.

In regard to the 6th interrogatory, a comparison of its language with that of the statute as above quoted and with the language which I have quoted from B. & O. R. R. Co. *v.* P., W. & Ky. R. R. Co., 17 W. Va., *supra*, will show that an affirmative answer, such as would have been most favorable to the defendant, ought not to have affected the general verdict, nor, indeed, would it have been inconsistent therewith. The pivotal question is not whether the actual use of property petitioned for "is reasonably proper," but whether "such actual use is necessary to the enjoyment of its franchise." This is the test proposed by our statute and insisted upon by a former decision of this court.

93 Upon the whole, therefore, having failed to discover such error as ought to reverse the decision and judgment of the court below, I am of opinion that the same is not erroneous. The judgment of the court below is affirmed.

It will be observed that we have not considered the motion to dismiss the appeal or writ of error, and the reason is that counsel withdrew it, and all parties insisted upon a speedy decision of the questions involved between these two important public improvements.

We have, therefore, without committing ourselves upon any collateral questions which might be supposed to be involved, decided to affirm the court below.

94 UNITED STATES OF AMERICA, }
*State of West Virginia.* }

To the Honorable A. C. Snyder, presiding judge of the supreme court of appeals of the State of West Virginia:

The petition of the Wheeling and Belmont Bridge Company respectfully shows that on the thirteenth day of September, A. D. 1890, the supreme court of appeals of the State of West Virginia rendered a final judgment against your petitioner in a certain cause wherein The Wheeling Bridge Company was plaintiff and your petitioner was defendant, affirming a judgment rendered in said cause on the 16th day of April, A. D. 1890, by the circuit court of

Ohio county, in the State of West Virginia, whereby it was adjudged that the said Wheeling Bridge Company had lawful right to take for its purposes a certain parcel of land belonging to your petitioner, and whereby also commissioners were appointed to ascertain what would be a just compensation to your petitioner for the said land, and adjudging against your petitioner the costs in the said supreme court of appeals, as will appear by reference to the record and proceedings in said cause, and that said court is the highest court in said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes of the United States, because your petitioner claimed before the said supreme court of appeals of the State of West Virginia that the various acts of the Legislature of Virginia in which are found your petitioner's charter constituted a contract between the State and your petitioner, whereby there was secured to your petitioner the exclusive right of transportation for toll across the Ohio river within a distance extending one-half mile in a straight line above and below your petitioner's bridge,
95 and that the act of the Legislature of West Virginia, under the provisions of which the said Wheeling Bridge Company was proceeding to take your petitioner's land and to build thereon its bridge, violated the said contract and impaired the obligation thereof, and the said supreme court of appeals of the State of West Virginia decided against the validity of your petitioner's said claim, as appears by the record of the proceedings in said cause which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will ever pray, &c.

WHEELING AND BELMONT
BRIDGE COMPANY, *Petitioner.*
A. J. CLARKE AND
HENRY M. RUSSELL,
*Attorneys for Petitioner.*

Let the writ of error issue as prayed.
September 23d, 1890.

A. C. SNYDER,
*Presiding Judge of the Supreme Court of Appeals of the State of West Va.*

95½ [Endorsed:] Petition for writ of error.

96 *Writ of Error to State Court.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals

of the State of West Virginia, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Wheeling Bridge Company and The Wheeling and Belmont Bridge Company, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Wheeling and Belmont Bridge Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do
97 command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of September, in the year of our Lord one thousand eight hundred and ninety.

{ Seal Circuit Court United States, District West Virginia, Parkersburg, West Va. }

L. B. DELLICKER,
*Clerk C't Court U. States, Dist. of West Virginia.*

Allowed by—
A. C. SNYDER,
*Presiding Judge of the Supreme Court of the State of West Virginia.*

An official copy of the above writ of error was lodged in the office of the clerk of the supreme court of appeals of the State of West Virginia September 29th, 1890.

Attest:
O. S. LONG,
*Clerk of the Sup. C't of Appeals of W. Va.*

97½ [Endorsed:] Writ of error.

98 Know all men by these presents that we, "The Wheeling and Belmont Bridge Company," J. N. Vance, and M. Reilly,

are held and firmly bound unto the "Wheeling Bridge Company" in the full and just sum of one thousand (1,000) dollars, to be paid to the said "Wheeling Bridge Company," its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of September, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a session of the supreme court of appeals of West Virginia, in a suit depending in said court between the "Wheeling Bridge Company" and "The Wheeling and Belmont Bridge Company," a final judgment was rendered against the said "The Wheeling and Belmont Bridge Company," and the said "The Wheeling and Belmont Bridge Company" having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to revise the said judgment in the aforesaid suit, and a citation directed the said "Wheeling Bridge Company," citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October, 1890:

99 Now, the condition of the above obligation is such that if the said "The Wheeling and Belmont Bridge Company" shall prosecute said writ of error to effect and answer all damages and costs if "The Wheeling and Belmont Bridge Company" fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of the Wheeling and Belmont Bridge Company.]

THE WHEELING AND BELMONT BRIDGE CO.,
By J. N. VANCE, *Pres't.* [SEAL.]
J. N. VANCE. [SEAL.]
M. REILLY. [SEAL.]

Sealed and delivered in the presence of—
T. M. RIELLY.
JOS. LAWSON.

Approved by—
A. C. SNYDER,
*Presiding Judge of the Supreme Court of Appeals of the State of West Virginia.*

The original bond, of which the foregoing is a true copy, was filed in the clerk's office of the supreme court of appeals of the State of West Virginia on the 29th day of September, 1890.

Attest:
O. S. LONG,
*Clerk of the Sup. C't of Appeals of West Va.*

100 THE UNITED STATES OF AMERICA:

To the Wheeling Bridge Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of West Virginia, wherein the Wheeling and Belmont Bridge Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. C. Snyder, presiding judge of the supreme court of appeals of the State of West Virginia, this 23d day of September, in the year of our Lord one thousand eight hundred and ninety.

A. C. SNYDER,
*Presiding Judge of the Supreme Court of Appeals of the State of West Virginia.*

101 [Endorsed:] Citation.

STATE OF WEST VIRGINIA, }
*County of Ohio,* } *ss:*

Henry M. Russell, being duly sworn, says that he served the within citation by delivering a copy thereof, on the 25th day of September, A. D. 1890, in Ohio county, West Virginia, to William P. Hubbard, the attorney of record of the within-named Wheeling Bridge Company.

HENRY M. RUSSELL.

Sworn to and subscribed by the above-named Henry M. Russell before me, a notary public for Ohio county, West Virginia, in my said county, this 23d day of September, A. D. 1890, as witness my official signature and seal.

[Seal L. F. Stifel, Notary Public, Ohio County, W. Va.]

LOUIS F. STIFEL,
*Notary Public in & for Ohio County, W. Va.*

102 I, O. S. Long, clerk of the supreme court of appeals of the State of West Virginia, hereby certify that the foregoing is a true transcript of the record of proceedings had in the said supreme court of appeals in a case lately depending therein, in which The Wheeling and Belmont Bridge Company was plaintiff in error and The Wheeling Bridge Company was defendant in error, as fully as the same remains of record in my office, omitting therefrom copies of the writ of error issued from this court, bond given before the clerk of the circuit court of Ohio county, notices of hearing, affidavit filed, and proceedings had upon a motion to dismiss the writ of error as having been improvidently awarded, and omitting also the plats referred to on pages 11 and 43 of the printed transcript hereto attached.

Seal Supreme Court of Appeals, West Virginia.

In testimony whereof I have hereunto set my hand and affixed the seal of our said supreme court of appeals of the State of West Virginia, at Charleston, this 30th day of September, 1890, and in the 28th year of the State.

O. S. LONG.

103 In the Supreme Court of the United States, to wit:

THE WHEELING BRIDGE COMPANY v. WHEELING AND BELMONT BRIDGE COMPANY. } A Writ of Error to the Supreme Court of Appeals of the State of West Virginia.

To the honorable judges of the said Supreme Court of the United States:

Your petitioner, The Wheeling and Belmont Bridge Company, the plaintiff in error, respectfully assigns the following errors in a judgment of the said supreme court of appeals of West Virginia, rendered in the above-entitled cause on the 13th day of September, in the year 1890, as appears by the transcript of the record therein returned with the said writ of error and herewith submitted—that is to say:

1. The said supreme court of appeals of the State of West Virginia erred in affirming the judgment of the circuit court of Ohio county, rendered in the said cause on the first day of March, in the year 1890, which judgment was erroneous in the following particulars, namely:

*a.* In that by the said judgment your petitioner's plea No. 5 was rejected. This plea is found on page 18 of the printed record in the State court, returned to this court as part of the transcript of the record in the State court.

*b.* The said judgment was erroneous in rejecting your petitioner's plea No. 6, which is found on page 20 of the said printed record. This plea set up that the statute of the said — of West Virginia, under which the defendant in error asserted the right to build its bridge, impaired the obligation of a contract between the State and your petitioner.

*c.* The said judgment was erroneous in rejecting your petitioner's plea No. 7, found on page 22 of the said printed record. This plea also set up, in somewhat different form, that the statute under
104 which the defendant in error asserted its right to build its bridge impaired the obligation of a contract between your petitioner and the State.

2. The said judgment of the supreme court of appeals of the State of West Virginia was erroneous in affirming the judgment rendered by the circuit court on the 16th day of April, in the year 1890, whereby commissioners were appointed to ascertain the compensation to be paid for your petitioner's land. This judgment is found on page 26 of the said printed record, and was based upon and grew

out of the errors theretofore committed in rejecting your petitioner's said pleas.

Your petitioner therefore prays that the said judgment of the said supreme court of appeals of West Virginia may be by this court reversed and annulled; and your petitioner will ever pray, &c.

A. J. CLARKE AND
HENRY M. RUSSELL,
*Counsel for Petitioner.*

104½ [Endorsed:] Supreme Court. Wheeling Bridge Co. *v.* Wheeling & Belmont Br. Co. Assignment of errors.

Endorsed on cover: West Virginia supreme court of appeals. No. 1425. The Wheeling & Belmont Bridge Company, plaintiff in error, *vs.* The Wheeling Bridge Company. Filed October 16, 1890.

# IN THE
# SUPREME COURT OF THE UNITED STATES.

THE WHEELING AND BELMONT BRIDGE COMPANY,
*Plaintiff in Error,*

vs.

THE WHEELING BRIDGE COMPANY,
*Defendant in Error.*

Brief for the Plaintiff in Error on the motion to dismiss the writ of error and the motion to affirm the judgment.

# IN THE
# SUPREME COURT OF THE UNITED STATES.

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THE WHEELING AND BELMONT BRIDGE COMPANY,
*Plaintiff in Error,*

vs.

THE WHEELING BRIDGE COMPANY,
*Defendant in Error.*

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**Brief for the Plaintiff in Error on the motion to dismiss the writ of error and the motion to affirm the judgment.**

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The motion made by the defendant in error to dismiss this cause is based on two grounds, the first that the judgment sought to be reviewed is not final, and the second that the record presents no federal question for the determination of this court.

I. The Supreme Court of Appeals of West Virginia decided this cause at the September term in the year 1890. At the June term of the same year the Wheeling Bridge Company presented to that court a motion to dismiss the writ of error which it had allowed. That motion was based upon the same ground which is here alleged, namely: That the order of the circuit court was not a final order. After argument upon that motion the state court declined to dismiss the cause, and at the September term when the cause came on regularly for argument upon the merits the defendant in error withdrew its motion to dismiss. Although the motion was pointed at the jurisdiction of the court, and although the court had held again and again that it was its duty to decline to assume

a jurisdiction which it had not, the court says in its opinion that the motion to dismiss has not been considered. It exercised jurisdiction over a case with regard to which it declined to say whether it had jurisdiction or not. So far as this braneh of the motion is concerned the same question is presented here which was presented to the state Supreme Court. In considering it, it is unimportant whether a federal question is presented by the record or not. The two branches of the motion are entirely distinct.

The mode of proceeding to condemn land for public use is set forth in Chapter 42 of the Code of West Virginia of 1887. The proceeding there provided for is to some extent summary, and is throughout informal. The petitioner notifies the defendant that he will present or has presented his petition to the circuit court, and on the day named in his notice files his petition. No particular method in provided of interposing a defense pointed at the right to condemn, but in the case of the *Pittsburgh, Wheeling and Kentucky Railroad Company* against the *Baltimore and Ohio Railroad Company*, 17 W. Va. 825, it was held proper to file pleas setting up the defense and it was also held that the right to condemn, in whatever mode that right might be impugned, should be determined before the appointment of commissioners to ascertain the value of the land. After that question has been determined, the court appoints commissioners who view the land, hear evidence and report the amount of compensation to be paid. If the report be confirmed the title to the land vests in the applicant without any order to that effect. It will be observed that the proceedings which follow the appointment of the commissioners have respect wholly to the amount of the compensation and not at all to the right of the applicant to take the land. In the present case the writ of error in the state court was to the order of the circuit court determining that the applicant had lawful right in this proceeding to take, for the purpose stated in its petition, the parcel of land in the said petition mentioned and described, and appointed the commissioners to ascertain what compensation should be paid. Before arriving at the stage of the cause at which this order was made, the circuit court had already rejected the pleas which raised the federal question in the cause. Section 20 of the chapter referred to is as follows: "After

> such report has once been made, whether it be set aside, recommitted or new commissioners appointed or not, or whether a trial by jury be demanded and had or not, the applicant, upon paying into the court the sum ascertained by such report, with legal interest thereon, from the date of the report until payment, may, notwithstanding the pendency of further proceedings, enter upon, take and use for the purpose specified in the application, that part of the land in respect to which such payment is made, and where such payment has been made and possession taken, or where payment has been made without taking such possession, in a pending case, it shall have the same effect as if

such payment were made, or possession taken, or both, in a case hereafter commenced. And no order shall be made, or any injunction awarded, by a court or judge, to stay him in so doing, unless it be manifest that the applicant is insolvent, or that he, or his officers, agents or servants are transcending their authority, or that such interposition is necessary to prevent injury which cannot be adequately compensated in damages."

The statute gives to the petitioner the possession of the land at that stage of the proceedings, because the right to the land has then been finally determined.

1. The judgment appealed from is a final judgment, under the decisions in West Virginia. The Code, chapter 135, section 1, contains the following provision: "A party to a controversy in any Circuit Court "may obtain from the Supreme Court of Appeals, or a judge thereof, "in vacation, an appeal from, or a writ of error or supersedeas, to a "judgment, decree or order of such Circuit Court, in the following "cases:

"In civil cases where the matter in controversy exclusive of costs is "of greater value or amount than one hundred dollars, wherein there "is a final judgment or decree or order."

In *Hill* v. *Als*, 27 W. Va., on page 215 the court says, "No case can "be rightfully considered by us, unless the record affirmatively shows "that we have jurisdiction, and this we are obliged to determine "whether our attention is specially called to it by counsel, or not, for "otherwise we would be proceeding to pass upon matters over which "we had no jurisdiction, and any conclusion or decree we might reach "would be *coram non judice* and void." In *Shirly* v. *Musgrave*, 29 W. Va. 140, the court says, "The most formal consent of parties can give "us no right to assume jurisdiction not conferred on us by law."

In the light of these decisions the assumption of jurisdiction in the case at bar constituted a decision that the jurisdiction existed, and consequently that the order appealed from was final within the meaning of the statute.

The State court had assumed jurisdiction on a writ of error to a precisely similar order in *Railway Company* v. *Iron Works*, 30 W. Va. 710. In the brief filed by the defendant in error in support of the present motion, the statement is made that the propriety of allowing the appeal was not presented to the State court in that case, because the plaintiff wished to prevent further delay, and that both sides urged upon the court a decision upon the merits. In the report of that case no such facts are stated. If this court should follow the counsel for the defendant in error into an examination of the briefs filed in that case, it would discover that the court's attention was called to the question of jurisdiction. Indeed, the very brief in which counsel tells this court that the propriety

of the allowance of the appea was not suggested to the court in the Iron Works case, shows that the question was suggested. If it was claimed that an appeal should be allowed because a railroad came under the term "road," the propriety of allowing an appeal was thereby suggested.

The case of *Pack* v. *Railway*, 5 W. Va. 118, is cited in support of the contrary view. With the latter decisions in our favor, we can afford to be indifferent about the *Pack* case. Rightfully considered, however, that case is not in conflict with the others. At the time when the appeal was taken, no objection had been made to the appointment of commissioners, and it was still open to the defendant to bring before the circuit court the right to condemn the land. *Railway Company* v. *Railway Company*, 17 W. Va. 835. The only controversy before the court was one with regard to the amount of damages, and as that controversy had not been determined at the the time of the appeal, there had been no final order from which an appeal would lie.

The defendant in error relies upon the provision of the state constitution, requiring the court of appeals to consider and decide every point fairly arising upon the record, to state its reasons in writing, and to prepare a syllabus of the points adjudicated. As the question of jurisdiction is not mentioned in either syllabus or opinion in *Railway Company* v. *Iron Works*, it is argued that the court of appeals did not consider that question as fairly arising. It is enough to say that this constitutional provision has been held to be merely directory, so that its absence from the syllabus or opinion does not determine that a point was not adjudicated in the cause. *Henry* v. *Davis*, 13 W. Va. 230, 252.

2. It is true that this court must determine for itself whether a final judgment has been rendered in the cause. The fact that the state Supreme Court might have jurisdiction to render the judgment, would not conclusively establish the jurisdiction of this court. In *Reddall* v. *Bryan*, 24 Howard, 420, cited for the defendant in error, the statute of Maryland gave the Supreme Court of the state jurisdiction over interlocutory orders, and this court held that, though the order in that case might properly have been reviewed by the state court, yet as it was interlocutory only, it could not be brought here for revision. But where the jurisdiction of the state court depended, as here, on the finality of the judgment, the same question is presented here which was necessarily passed on there. That which was final in the state court, is none the less final when it reaches this court.

Upon reason, as well as upon authority, the order in question is final. Even if we adopt the definition of a final judgment given in the brief for the defendant in error, this conclusion must follow. It is there said that a decree or order is final which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness

for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the decree. The "subject" here means, of course, the subject of the controversy.

A condemnation proceeding, under the statutes of West Virginia, is anomalous in that, while it is a single proceeding, it involves two distinct actions, each complete in itself with actor, defendant and subject matter. One of these respects the land, the other the damages. In some of the states these actions are separated. The petitioner takes certain prescribed steps, usually *ex parte*, which vests in it a title to the land. The land-owner then brings his separate action for the damages. In West Virginia these two proceedings are consolidated, but are none the less distinct in their natures. There is an action by the petitioner for the land, and a cross-action by the land-owner for the damages.

To lose sight of this duality, when undertaking to apply the definition to the order in this cause, will merely beget confusion. What is the subject of the controversy? Is it the land and the damages? That is true of an ejectment, where the plaintiff sues for the land and for damages for its detention from him, and in that case a judgment is rendered for the plaintiff and against the defendant for both land and damages. Here there are two subjects of controversy, for one of which the petitioner seeks a judgment, and for the other the land-owner. In order that there may be a final judgment as to one subject, it is not necessary that the same judgment shall be final as to the other.

Apply now the definition to the order so far as it respects the land. This whole subject has been disposed of. The court has ascertained that the petitioner has the right to the land, has given the petitioner all the relief contemplated, and has provided for giving effect to the judgment. True, the commissioners must meet and determine the amount of the damages before the petitioner can have possession of the land, but there is nothing more for the court to do. The appointment of the commissioners is the court's method of giving effect to the judgment disposing of the land. The commissioners prepare their report, not in court, but in the country, return it to the clerk's office [Code, ch. 42, §15] while perhaps the count is not in session, and immediately, without any further order or proceeding by the court, the petitioner may deposit the damages, the subject of the other controversy, and have the land. If the court has not disposed of the land it can never do so, for there is no subsequent order or judgment respecting the land provided for in the statute regulating the proceeding. Everything yet to come has respect to the other subject of controversy, the damages.

It is said, however, that the petitioner gets no *title* to the land by virtue of this order, that the title only vests on the confirmation of the report, and that the title to the land—not the land itself?—is the subject of the controversy.

Without any subsequent order or judgment of the court and by virtue of the provisions made in the order for giving effect to the sentence, the order in question gives to the petitioner, the right to the possession of the land. This is a legal right, the enforcement of which the land-owner cannot resist. We would not know how better to define the title to land than by describing it as the legal right to the possession. If therefore the title to the land is the subject of the controversy, the petitioner by this order has obtained a judgment for it. The judgment, it is true, is conditional, but the condition is not subjected to the further supervision of the court. The court has finished with the subject. The petitioner performs the condition out of court, and without waiting to have the court adjudicate in any manner upon the sufficiency of the performance, takes lawful possession of the land which has been adjudged to it.

Not only does the order in question dispose of the whole subject of the controversy and provide for giving effect to the sentence, but it also gives all the relief contemplated by the petitioner in beginning its proceeding. What the petitioner sought to obtain was the land. When it shall have obtained the land, the object of its suit will have been accomplished. It seems absurd to suggest that a part of the relief sought by the petitioner was a judgment against itself for damages. It submits to that judgment as a result of the establishment of the counter-claim by the land-owner. Its own case is completed by a judgment in its favor for all that it asks.

The authorities upon the precise point here involved preponderate in favor of plaintiff in error. In Wisconsin, the statute provided for an appeal in special proceedings, from a final order affecting a substantial right. After a controvery respecting the right to condem had been decided in favor of the petitioner, and commissioners had been appointed to assess damages, the Supreme Court of that state held that an appeal would lie without waiting for the coming in of the report. *Wis. Central Railway* v. *University*, 49 Wis. 162; *Same* v. *Same*, 52 Wis. 537.

Under a similar statute, the provisions of which are quoted *in re Jones*, 33 Minn. 406, a similar holding was made; *in re St. Paul, &c., Railway*, 34 Minn 227. There are quite a large number of cases in New York in which similar holdings have been made under similar statutes. *Railway* v. *Rau*, 70 N. Y. 191; *in re Railway*, 63 N. Y. 326; *in re Railway*,, 46 N. Y. 546; *Davis* v. *Railway*, 43 N. Y. 147.

The fact that a distinct controversy still remains to be decided in the same proceeding, and that therefore there will be in the cause a second judgment which will be final for the purposes of appeal, furnishes no argument against the finality of the order now in question. Whether an order is interlocutory or final for the purposes of appeal depends not upon the period of the cause at which it is entered, but upon the effect

upon the parties. *Barry* v. *Briggs*, 22 Mich. 201. The Supreme Court of Michigan in another case has stated the proposition in this way: "The "only ground suggested for a contrary view is that hereafter, when the "accounting is complete, there must be a further decree. But it is not "unprecedented that there should be two decrees in the same case "which are final in the sense of finally determining the right, and "when the effect is such that the party obtaining the decree is imme- "diately put into possession of the right adjudged to him, the right to "appeal ought not to be questionable." *Smith* v. *Walker*, 47 Mich. 456.

Many cases have been decided by this court in which it has been necessary to ascertain whether there were final decrees, of which alone this court has jurisdiction on appeal. There has never been any hesitancy in determining that a decree was final which disposed of the subject of controversy by transferring it, or directing it to be transferred, from one party to another, notwithstanding there might remain to be determined other questions in the cause which would also be the occasions of controversies between the parties. Without going over the list list of these decisions, it will be sufficient to refer to the case of *Forgay* v. *Conrad*, 6 How. 201.

II. There can be no serious doubt that a federal question is properly presented by the action of the court in rejecting pleas 6 and 7, which action resulted in the final judgment in favor of the petitioner in this cause.

1. It is said that no federal question arises on the rejection of the pleas, because the pleas were bad for informalities, and should have been rejected whatever the court might think of the constitutionality of the statute complained of.

If it should be admitted that the pleas were informal according to strict rules of English Common Law practice, there are still two adequate replies to the suggestion which has been made. First, the Supreme Court of Appeals of West Virginia, in its opinion in this cause, treated the pleas as sufficient under the West Virginia practice, and decided the case as though these pleas fairly raised the question intended to be presented by them, Whatever may have been the former rule, it is at present the practice of this court to look at the opinion of the State court in order to ascertain the ground of the decision. *Kreiger* v. *Railroad Co.*, 125, U. S. 39. Second, under the statute of West Virginia regulating proceedings to condemn land, no formal pleading is necessary. *Railway Co.*, v. *Railway Co.*, 17 W. Va., 835, is the leading case in the state upon the practice in these proceedings. The propriety of filing pleas is there asserted, but the right of the defendant to raise in any, the most informal manner the defenses he may wish to present, is fully recog-

nized. If then the defendant tenders pleas which, though they be unable to stand the severe test to which a plea in a common law action is subjected, nevertheless fairly present the defense, they will satisfy all the requirements of the practice in these proceedings.

But what is this criticism of the form of the pleas but an impotent attempt to avoid meeting the defense fairly set up in them? Judged by the severest rules, the pleas would be found sufficient, for in his search for defects, the counsel for the defendant in error has only been able to allege such as do not exist. Speaking of plea 3, he says: "There is "here no averment of the existence of a contract. This is simply the "conclusion of the plea." Yet he quotes in his brief that part of the plea which alleges positively, and not by way of recital, that there arose a contract between the state and the defendant that the defendant should enjoy the exclusive privilege claimed.

Again, with reference to the seventh plea, it is said: "Nor does plea "No. 7 aver the existence any contract between the state and the defend-"ant." Yet the language of the plea is: "And the said defendant says "that out of the said charter and the said powers and authorities so "granted and confirmed and the erection of the said bridge in pursuance "thereof, arose a contract between the said State of Virginia and the said "defendant that the said State would not during the chartered existence "of the said defendant authorize or permit any other bridge for the "transportation of persons, animals or vehicles across the Ohio river so "near the said bridge of the said defendant as seriously to impair the "value of the defendat's bridge by the diversion therefrom of the travel "and tolls, which would otherwise naturally flow in that direction. "And the said defendand says that upon the formation of the State of "West Virginia this State, as the successor of the State of Virginia in "the ownership of the Ohio river and its shores, because a party to the "said contract. And the said defendant says that the bridge so pro-"posed to be erected as aforesaid by the said petitioner is intended to "be a bridge for the transportation for toll of persons, animals and "vehicles over the said Ohio river, and that the proposed location thereof "and the said parcel of land described in the petition are within five "hundred feet of said bridge of the defendant, and so near the latter that "the erection and maintenance of the said proposed bridge of the petition-"er will necessarily seriously impair the value of the defendant's bridge by "the diversion therefrom of the travel and tolls which would otherwise "naturally flow in that direction." But counsel says: "What is pro-"vided in this respect *by the charter* and the said *powers and authorities* "does not appear by the plea. The *facts* are not stated." To this criticism there are two answers. First, the fact to be alleged is the existence of the contract, and that is positively stated; to have set forth

the evidence of the contract would have been bad pleading, notwithstanding that the contract was with a state and necessarily evidenced by a statute. Second, the absent *facts* for which counsel has been seeking are really matters of law, which never need be pleaded. These pleas were prepared for a West Virginia court, and in that state the charter of a corporation created by act of the legislature to prosecute a work of internal improvement is not required to be either pleaded or proved. The court takes notice of it judicially. *State* v. *B. & O. R. R. Co.*, 15 W. Va. 362.

There can be no serious question that pleas 6 and 7 present a federal question. They set up a contract with the state whereby an exclusive privilege was secured to the plaintiff in error, and the subsequent passage of a public law whereby this exclusive privilege is sought to be taken away, and they allege this latter law to be unconstitutional as impairing the obligation of the contract between the state and the plaintiff in error.

**2.** It is urged that, even if these pleas present a federal question this, court is without jurisdiction because: (*a*) The record does not affirmatively show that the decision of the federal question was necessary to the decision of the case, the decision of the state court being broad enough to maintain the judgment independently of the federal question. (*b*) The pleas might have been held bad for the techincal insufficiency.

(*a*) The rejection of these pleas was a necessary step in reaching the judgment complained of. If they had been held good the judgment could not have been rendered. The decision, therefore, of the question presented by the pleas was necessarily involved in the judgment. Passing for the moment the suggested technical insufficiency, could the state court have held the pleas bad without deciding a federal question? When the jurisdiction of this court is invoked, on the ground that a law of a state has impaired the obligation of a contract, the enquiry resolves itself into two parts. The court must first determine whether a contract existed, and next whether its obligation has been impaired. The jurisdiction is not confined to cases where the contract is admitted to have an existence, or to those in which the state court may hold that it exists. A contract was set up in the pleas. The state court, conceding that, if a contract existed, its obligation had been impaired, held as appears from its opinion, that no such contract existed. However this conclusion was reached, whether on the construction of the statute of 1840, or otherwise, it is subject to review by this court, which must decide for itself the question of the existence of the contract. The right to decide this question intimates the existence of the jurisdiction. *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S. 697; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388.

[*b*] The techinal frame of the pleas has already been discussed. The

case of *Commercial Bank* v *Rochester*, 15 Wall. 639, relied on for the defendant in error, was a case in which the plaintiff had mistaken his remedy and the opinion of the state court rested solely on that ground.

3. It is said that the state court did not pass upon the validity of any statute of the state, but decided the case on the construction of the statute of 1840. True, the court decided the case on the construction of that statute and the statutes which constitute the charter of the plaintiff in error, and held that these statutes did not create a contract with the state. That is, the state court decided one of the two elements which which compose the federal question in cases in which the obligation of a contract is alleged to have been impaired. In *Louisville Gas Co.* v. *Citizens Gas Co.* 115 U. S. 683, the construction of the state statute relied on as evidencing a contract was before the state court, which decided that it had no such effect. This court said, at page 697: "The "judges of the state court all concurred in the opinion that no such in- "tent was plainly expressed. As this question is at the very founda- "tion of the inquiry whether the defendant had a valid contract with the "state, the obligation of which has been impaired by subsequent legis- "lation, we cannot avoid its determination. Whether an alleged con- "tract arises from state legislation, or by agreement with the agents of "a state, by its authority, or by stipulations between individuals exclu- "sively, we are obliged, upon our own judgment and independently of "the adjudication of the state court, to decide whether there exists a "contract within the protection of the Constitution of the United "States."

4. It is said that at the time when the plaintiff in error was incorporated the law gave no exclusive rights to ferries; that the law of 1882 took away the exclusive rights of ferries; therefore the state of the law at present is the same as the state of the law before the plaintiff in error was chartered; consequently the law complained of as impairing the obligation of the contract was passed before the contract was made, and this court, under a well settled rule, has no jurisdiction. This mode of "tacking" statutes has, at least the merit of novelty. Unfortunately, the argument has no other merit. It would be equally applicable to every other case in which a contract with the state was first made and afterwards repealed, for the repeal would be a return to the state of the law as it was before the contract. But the argument has not even the advantage of a basis of fact. The plaintiff in error's charter is found in two acts of the Virginia Legislature, the first passed in 1816 and the second 1847. The contract was made by the latter of these, and when it was passed the law of 1840, giving exclusive rights to ferries, was in full force.

5. The fifth point made by the defendant in error, under the second

branch of its motion to dismiss, opens up a discussion of the case upon its merits and will be adverted to in its proper place.

## THE MOTION TO AFFIRM.

It must be apparent to the court that the motion made by the defendant in error to dismiss the writ was made, not because of any merit in the motion, but in order to serve as a vehicle for the motion to affirm and in the hope of inveigling the court into a superficial and premature examination of the body of the case. The charge that the writ of error was taken for the delay only, finds as little support in the previous history of the cause as in the importance of the question involved. The initial step in this case was taken on the 8th day of February, of the present year. The case has made its way through two courts, and now, before the year is out, is docketed in the third. If delay had been its object, no great amount of ingenuity on the part of the plaintiff in error would have been required in order to make the case run a much more dilatory course. It is easy to affirm that the question involved is so frivolous as not to need further argument. To see only frivolity in an adverse argument, is not an uncommon defect in the professional vision. When, however, the gage is thrown down, we cannot avoid taking it up. When it is said that there is nothing in our case, the only course open to us is to present the case fully to the court, premising that there is no authority among the decisions of this court which makes against us, and that one leading case is both apposite to the case at bar and strongly in our favor.

In the year 1816, by an act passed on the 17th day of February in that year, [*Acts Virginia*, 1816, *pp.* 186 *to* 190,] the legislature of Virginia chartered the plaintiff in error and authorized it to erect a toll bridge across the Ohio river at Wheeling. Either because the powers and franchises granted in this charter were not sufficient to induce the investment of capital, or for some other reason, no action appears to have been taken at that time toward building the bridge. In 1847 the legislature passed another act, [*Acts Virginia*, 1846, *pp.* 149 *to* 151,] which enlarged the franchises of the plaintiff in error, in reality granting to it a new charter, authorizing it, for the first time, to build a suspension bridge, and providing that it should have power to purchase or acquire and hold all ferry rights and privileges between Zane's island and the main Virginia shore at the city of Wheeling. The plaintiff in error thereupon acquired by purchase the right to what was known as Zane's ferry.

The section of the *act relating to this matter is as follows:

> 12. The said company shall have power to purchase or acquire and hold all necessary rights of way on or across Zane's island, and

*This statute of 1847 is printed in full as an appendix to this argument.

other necessary ways, easements, rights, privileges and estates for the use, convenience and accommodation of their bridges or either of them, and all ferry rights or privileges between Zane's island and the main Virginia shore, at the city of Wheeling.

At that time the portion of the state which is now West Virginia had made little progress in material development. Railroads were unknown. The Ohio river from source to mouth had not been spanned by a single bridge. The people were poor, and enterprises, such as now are undertaken and completed with unhesitating facility, were then begun with hesitation and completed slowly and with difficulty. When, however, the valuable addition referred to had been made to the charter, and on the faith of the franchises which had been granted, the money was subscribed which was necessary to complete what was, at that time and under the circumstances, a work of stupendous magnitude. The plaintiff in error has ever since been in the enjoyment of the exclusive privilege of transporting the public across the river at this point, and now for the first time are its rights to this exclusive privilege impugned.

The plaintiff in error was given the power, not to extinguish, but to acquire and hold the ferry rights which then existed between the island and the shore. It is too plain for argument that, upon their acquisition, these ferry rights, whatever they were, became a part of the charter, in like manner as though these rights had been in terms defined in and expressly incorporated into the charter. It will also be observed that this charter, unlike the charters of the present day, contained no reservation to the legislature of the power to amend or alter it. In order, then, to ascertain what was granted by the charter, it is necessary to determine what these ferry rights were.

As the establishment of ferries involved the grant of franchises residing in the government, the legislature alone possessed power over the subject. But the legislature had delegated to the county courts of the several counties of the state, the exercise of that portion of its power, and had authorized the county courts to establish ferries.

In the year 1840 in an act on the 5th day of March, this section occurs:

*Be it Enacted by the General Assembly*, That it shall not be lawful for the court of any county to grant leave to establish a ferry over any water-course within one half mile, in a direct line, of any other ferry legally established over the same water-course; and if any person, not having heretofore obtained lawful authority to do so, shall keep a public ferry over the same water course legally established and regularly kept up, or shall keep a boat or boats, to carry persons, horses, or carriages of any kind, including wagons and carts, and shall actually carry the same, whether for reward or not, over any water-course within one half mile of any ferry which may at the time be legally established and regularly kept up over the same water-course; every person so offending shall, for every offense, forfeit and pay the sum of two hundred

dollars, to be recovered by action of debt, in the name and for the use of the proprietor or keeper of the ferry which shall be within the distance aforesaid: *Provided*, That the said penalty shall not be recoverable for the commission of such offense, oftener than once in any one month; and that nothing herein contained shall be so construed as to prevent any person from carrying the members of his own family or persons in his employment, and his own property across any watercourse in his own boats, or any merchant or miller from carrying free from toll, any person *bona fide* engaged in the actual transportation of grain, timber, or other produce, and necessarily accompanying the same, to or from his store or mill.

This statute was in force at the time when the defendant was authorized to acquire, as well as at the time when it did acquire, the ferry rights referred to in its charter. The statute annexed to every lawfully established ferry the exclusive right of transportation within the half mile mentioned in the act. By an obvious and necessary construction the statute with reference to ferries because as much a part of its charter as thought the latter had in terms provided that the plaintiff in error should have the exclusive privilege within one half mile of its bridge, or of the ferry whose rights it should acquire, of transporting persons, horses and carriages.

In *Mason* v. *Harper's Ferry Bridge Co*, 17 W. Va., 396, the Supreme Court of Appeals of West Virginia, decided that the exclusive right pertaining to a ferry was as much infringed by the erection of a bridge within the prohibited half mile, as it would have been by the establishment of another ferry. If, then, the plaintiff in error, by virtue of its charter, acquired a contract right to this exclusive privilege, the building of the proposed bridge of the defendant in error will subvert and destroy the exclusive feature of that right, and the statute under which the defendant in error is proceeding impairs the obligation of the contract, and is unconstitutional and void. That statute is found in the Code of West Virginia, Chapter 44, Sec. 6, 1887, and is as follows:

If any person or corporation shall, without having obtained the privilege to do so, as provided for in the four next preceding sections, establish, keep or maintain a ferry over any water-course, on or over which another ferry has been legally established, or shall keep a boat or other water craft with a hand or hands, generally ready to transport or carry any person, horse, carriage, wagon, cart or other thing, whether for reward or not, or shall for compensation furnish, hire or loan to another any boat, skiff or other water craft, to be used for ferrying any person or thing over such water-course, every person so offending shall be guilty of a misdemeanor and fined for each offense not less than twenty-five nor more than two hundred dollars. And if the owner or occupant of any land bordering on any such stream, shall suffer or permit another person who is keeping or maintaining any such ferry, or who is keeping such boat or other water craft with said hand or hands, with the object or for the purpose aforesaid, to

use any part of the land so owned or occupied by him, as a landing for such ferry, boat or other water craft, he shall be guilty of a misdemeanor and fined as aforesaid. And the owner or keeper of every such ferry, not legally established as aforesaid, and every person who shall keep such boat or water craft as aforesaid, and the owner or occupier of any such land as aforesaid, shall moreover be liable to the owner or lessee of any ferry legally established over such watercourse, for all such damages as he may sustain by reason of the unlawful keeping or maintaining of any such ferry, boat or water craft on any such water course. But no ferry privileges or franchises shall preclude the erection of bridges over any water course, or entitle the owner of such privileges or franchises to damages in case of the erection of a bridge or bridges over any water course.

Upon the acquisition of the ferry rights, the plaintiff in error was in the position of a bridge company to whom there had been granted by its charter the exclusive right of transportation within one half mile and which, upon the faith of the grant, had spent its money and constructed and maintained its bridge. Such a charter is a contract between the state and the corporation, and as such within the protection of the constitutional provision against impairing the obligation of contracts. The leading case upon this precise phase of the general subject is that of the *Binghamton Bridge*, 3 Wall. 51.

In 1805 the legislature of New York, in a lengthy statute establishing a system of turnpikes for a portion of the state, incorporated two bridge companies, one of which, the Delaware Bridge Company, was to erect bridges over the Delaware river. In this statute it was provided that it should not be lawful for any person or persons to erect any bridge or establish any ferry over the Delaware river within two miles of the bridges to be built by this company. After thirty years the bridges were to become the property of the state. By a subsequent section of the statute the Susquehanna Bridge Company was created, and, by a mere reference, was given like powers and franchises to those with which the Delaware Bridge Company had been invested. In 1808 a statute was passed whereby the thirty years limitation was done away with as to the Susquehanna Bridge Company. By the same statute the Chenango Bridge Company was created for the purpose of erecting and maintaining a bridge over the Chenango river at Binghamton, and it was provided that the Chenango Bridge Company was to have perpetual succession "under all the provisions, regulations, restrictions, clauses and pro-" visions of the before mentioned Susquehanna Bridge Company."

In 1855 the legislature authorized the building of another bridge at Binghamton, and a bridge was accordingly erected a few rods above the old one. The Chenango Bridge Company filed a bill to enjoin the new rival. The Supreme Court of New York dismissed the bill and an appeal was taken to this court.

In the case at bar it was insisted that there was no contract between the state and the Wheeling and Belmont Bridge Company, whereby an exclusive right was secured to that company because, it was urged, there was nothing said in its charter about any exclusive right. It was pointed out that contracts of the kind are always construed most strongly in favor of the state, and are never established by implication, but only where there has been a grant in express words. The necessity of referring from one statute to another was treated as though ambiguity was thereby created. That which is merely collocation and construction was criticised as though it were equivalent to deducing from what is expressed that which the legislature has left unsaid. Refer now to the *Binghampton Bridge* case. Not a word had been said in the charter of the Chenango Bridge Company about exclusive rights. There had been a mere reference to the rights which had been previously granted to the Susquehanna Bridge Company, which in turn had been granted by a reference to the charter of the Delaware Bridge Company. Nor did the grant to the Delaware Bridge Company fit the Chenango Bridge Company, for the exclusive right of the former extended for two miles either way, while at a distance of less than a mile below the bridge of the latter company, the Chenango river was lost in the waters of the Susquehanna.

Again, in the case at bar it was insisted in the court below that no contract existed between the state and the plaintiff in error, even if the case be considered as though the charter had contained *in extenso* the provisions of the statute relating to the establishment of ferries. Attention was called to the fact that the act of March 5th, 1840, merely provided that it should not be lawful for the county courts to establish ferries within the prescribed distance, and that it should be unlawful for unauthorized persons to transport persons, horses or carriages within the limits. The substantial identy of bridge and ferry, asserted in *Mason v. Bridge Company*, 17 W. Va. 411 was not denied, but it was claimed that even if in the defendant's charter the legislature had said: "It "shall not be lawful for the county court to grant leave to establish a "ferry or bridge within one-half mile of the bridge to be built by the "company hereby incorporated, and it shall be unlawful for any person "to transport persons, horses or carriages across the Ohio river within "the same limits," this would not have created a contract. There would have been, it was said, neither the mutuality nor the consideration necessary to a contract. The prohibition would have constituted a mere legislative enactment, repealable at pleasure, and this argument is repeated in the brief filed for the defendant in error on the present motion. In the *Binghampton Bridge* case Mr. Dickenson presented a similar argument. He said on page 68: "Supposing, however, that the

" phrase 'it shall not be lawful,' &c., does apply to the Chenango bridge, " does it make a contract? *Is it not mere legislative enactment, subject to* " *repeal like any other statute?* It has neither consideration, nor mutu- " ality, nor form, nor substance, nor any other element of a contract. " * * * * * * The state by the expression used, incorporates the " petitioners with certain rights, and authorizes them to erect and main- " tain a bridge and collect tolls, and *volunteers* a provision that compe- " tition within two miles shall not be lawful. The corporators neither " pay nor agree to pay anything; they neither do nor agree to do any- " thing in consideration of the charter."

Again it was argued, and it is now argued by the defendant in error, that the prohibition in the act of March 5, 1840, is upon the county courts and not upon the legislature. *Fanning* v. *Gregoire*, 16 How. 524, a case which turned purely upon the construction of a grant, is cited in support of the proposition. The expressions in *Sommerville* v. *Wimbish*, 7 Gratt. 231 are referred to as showing that the legislature had never divested itself of its control over the abolition of ferries and these are fallaciously applied to a charter into which had been incorporated a provision against competition similar to that which had been made with respect to ferries. The plaintiff in error acquired the ferry rights, it is said, these rights were, before the plaintiff in error acquired them, subject to the will of the legislature; the plaintiff in error therefore took them subject to the legislative control. Unmindful of the difference between a mere license to operate a ferry, for the control of which the legislature might make and unmake laws laws at pleasure, and a charter in which the rights of the corporation are defined by a reference to existing provisions of the ferry law, it was argued that because laws relating to ferries could be changed at will, therefore also the legislature retained control of the rights granted to the plaintiff in error and could modify them at pleasure. This, said the defendant in error, is not the establishment by the county court of bridge or ferry. It is the legislative destruction by the statute of 1882, of the exclusive rights of ferries, and with these fell also the exclusive rights which the defendant had acquired under the power granted in its charter. Mr. Dickenson made a like argument in the *Binghampton Bridge case*. He said at page 68: " But conceding that it was not lawful for any person or persons of " their own right or by authorization from the county boards or courts " to erect a bridge over this stream within two miles of the complain- " ant's bridge above or below that of the complainants, *does the legisla-* " *ture bind and prohibit itself from erecting a bridge*, both directly and by " delegation? * * * The provision of the 31st section of the char- " ter, declaring that it should not be lawful for any person or persons to " erect any bridge or establish any ferry within two miles of the bridge,

"&c., applied to superintendants and commissioners of highways, and "the courts of common pleas, and to private persons. * * * There "were thus sufficient persons and officers and public authorities to satisfy "fully the restriction clause in the section without extending its opera- "tion to the state or the legislative authority."

The court, in a powerful opinion, disposed of the arguments addressed to it, and with them of most, if not all, of the arguments which have been made for the defendant in error upon this branch of the present case. It said:

"The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, "has been denied. We have supposed, if anything was settled by an "unbroken course of decisions in the federal and state courts, it was, "that an act of incorporation was a contract between the state and the "stockholders. All courts at this day are estopped from questioning "the doctrine. The security of property rests upon it, and every suc- "cessful enterprise is undertaken, in the unshaken belief that it will "never be forsaken.

"A departure now would involve dangers to society that can not be "foreseen, would shock the sense of justice of the country, unhinge its "business interests, and weaken, if not destroy, that respect which has "always been felt for the judicial department of the government. An "attempt even to reaffirm it, could only tend to lessen its force and ob- "ligation. It received its ablest exposition in the case of *Dartmouth "College* v. *Woodward*, which case has ever since been considered a "landmark by the profession, and no court has since disregarded the "doctrine, that charters of private corporations are contracts, protected "from invasion by the constitution of the United States. And it has "since so often received the solemn sanction of this court, that it would "unnecessarily lengthen this opinion to refer to the cases, or even "enumerate them."

And again: "A great deal of argument at the bar was devoted to "the consideration of the proper rule of construction to be adopted in the "interpretation of legislative contracts. In this there is no difficulty. "All contracts are to be construed to accomplish the intention of the "parties; and in determining their different provisions, a liberal and fair "construction will be given to the words, either singly or in connection "with the subject matter. It is not the duty of the court, by legal sub- "tlety, to overthrow a contract, but rather to uphold it and give it ef- "fect; and no strained or artificial rule of construction is to be applied "to any part of it. If there is no ambiguity, and the meaning of the "parties can be clearly ascertained, effect is to be given to the instru- "ment used, whether it is a legislative grant or not. In the case of

" the Charles River bridge, the rules of construction known to the Eng-
" lish common law were adopted and applied in the interpretation of
" legislative grants, and the principle was recognized that charters are
" to be construed most favorably to the state, and that in grants by the
" public nothing passes by implication. This court has repeatedly since
" reasserted the same doctrine; and the decisions in the several states
" are nearly all the same way. The princinple is this: that all rights
" which are asserted against the state must be clearly defined, and not
" raised by inference or presumption; and if the charter is silent about
" a power, it does not exist. If, on a fair reading of the instrument,
" reasonable doubts arise as to the proper interpretation to be given to
" it, those doubts are to be solved in favor of the state; and where it is
" susceptible of two meanings, the one restricting and other extending
" the powers of the corporation, that construction is to be adopted which
" works the least harm to the state. But if there is no ambiguity in the
" charter, and the powers conferred are plainly marked, and their lim-
" its can be readily ascertained, then it is the duty of the court to sustain
" and uphold it, and to carry out the true meaning and intention of the
" parties to it. Any other rule of construction would defeat all legisla-
" tive grants, and overthrow all other contracts."

The court then proceeded to show that the fact that the contract and the exclusive privileges of the Chenango Bridge Company had to be sought in various statutes, and imported by reference from one into the other, did not render the contracts or the rights either doubtful or less entitled to protection, and passing to other questions, continues: "The
" legislature has the power to license ferries and bridges, and so to reg-
" ulate them, that no rival ferries or bridges can be established within
" certain fixed distances. No individual without a license can build a
" bridge or establish a ferry for general travel, for 'it is a well settled
" principle of common law that no man may set up a ferry for all pas-
" sengers, without prescription time out of mind, or a charter from the
" king. He may make a ferry for his own use, or for the use of his
" family, but not for the common use of all the king's subjects passing
" that way, because it doth in consequence tend to a common charge,
" and is become a thing of public interest and use; and every ferry
" ought to be under a public regulation.' As there was no necessity of
" laying a restraint on unauthorized persons, it is clear that such a re-
" straint was not within the meaning of the legislature. The restraint
" was upon the legislature itself. The plain reading of the provision,
" 'that it shall not be lawful for any person or persons to erect a bridge
" within a distance of two miles,' is that the legislature will not make it
" lawful by licensing any person, or association of persons to do it.
" And the obligation, includes a free bridge as well as a toll bridge, for

" the security would be worthless to the corporation if the right by impli-
" cation was reserved, to authorize the erection of a bridge which should
" be free to the public. The Binghampton Bridge Company was char-
" tered to construct a bridge for general road travel, like the Chenango
" bridge and near to it, and within the prohibited distance. This was a
" plain violation of the contract which the legislature made with the
" Chenango Bridge Company, and as such a contract is within the pro-
" tection of the Constitution of the United States, it follows that the
" charter of the Binghampton Bridge Company is null and void."

1. Attention is called to the fact that the law of 1840, conferring privileges on ferries, was passed long after the plaintiff in error was chartered. As has already been pointed out, this suggestion is both true and false. It is true that the original charter was granted in 1816. It is also true that the amendment to the charter, which contains the contract relied upon, and under which the plaintiff in error built its bridge, was passed after the statute of 1840 was passed, and had defined the exclusive rights of ferries and thus made it possible, by a reference to these and without repetition, to grant to the plaintiff in error the right which it claims.

2. There is one argument which seems to be peculiarly convincing both to the counsel for the defendant in error and to the state court. It is that growing out of the control which the legislature had over these ferry rights so long as they remained in Zane. In its opinion the state court says:

" It is conceded in the argument and briefs of counsel that " Zane's
" Ferry," which the defendant purchased, was licensed at an early day,
" when no such exclusive privilege as that claimed was attached to the
" franchise. Subsequently (1840), the general assembly of Virginia
" by general law, and gratuitously, without further consideration from
" established ferries, and as a bounty or subsidy to them, prohibited the
" county courts from licensing a ferry within one half mile in a direct
" line from an established ferry. This subsidy, so far as it favored exist-
" ing ferries, was purely gratuitous, and as much subject to withdrawal
" by repeal, as any other act of the legislature, designed to encourage
" a particular branch of industry, or improvement.

" Zane, as the recipient of a gratuitous bounty, could not complain if
" the same legislative wisdom which conferred, should upon reasons of
" public policy withdraw it. The Wheeling and Belmont Bridge Com-
" pany was authorized (1847) to purchase his rights, privileges and fran-
" chises. But such purchase could not enlarge or add to them. The
" idea that such authority to purchase enlarges the estate of the vendor,
" and converts an incidental bounty into a vested right, cannot be suc-
" cessfully maintained."

Counsel for the defendant in error says in his brief:

"The plaintiff in error has at times claimed that the Virginia act of "1847, which merely authorized it to buy Zane's ferry with its rights, "while the law was in force prohibiting the county courts from estab- "lishing a new ferry within half a mile, in some way constituted a con- "tract that such prohibition should continue, so that in the authority to "buy, and in the act of buying, the thing bought should change its "nature, and that which might be subject to repeal in the hands of the "vendor, should in the hands of the vendee become sacred. Such a "claim is hardly intelligible."

Neither court nor counsel seems to have been able to apprehend the position of the plaintiff in error upon this point, a difficulty which must certainly be due to some infelicity in presenting it and not to any fault in the position itself. For the position has in it nothing either of novelty or of difficulty.

When the owner of ferry rights grants these rights to another, the grantee takes and holds them precisely as the grantor held them. The rights themselves do not change with the change of ownership. If they were subject to destruction when in the hands of the grantor, they remain so in the hands of the grantee. Now, say both court and counsel, we have nothing to do but to apply this obvious and logical proposition to the case in hand. Mr. Zane, the owner of the ferry, is the grantor; the plaintiff in error is the grantee; the rights were subject to the will of the Legislature while in the hands of Mr. Zane, therefore they remain so in the hands of the plaintiff in error; *quod erat demonstrandum*.

The vice of the argument lies in the application of it. Why is it that rights which are granted remain unchanged in their character in passing to the grantee? It is because the only title of the grantee to the rights in question is derived from the grantor. The grantor is the only source of title, and he could only give what he had. He could not by the act granting, enlarge the subject of the grant. If then Mr. Zane had been the only source from which the plaintiff in error derived the rights in question, the argument would be unanswerable that they would have remained unaltered in its hands.

But the legislature had a larger title than Mr. Zane. He could not, but the legislature could make these rights irrevocable. The title of the plaintiff in error came two sources, and in order that the argument may be sound which seems so unanswerable to the state court and to counsel, the legislature as well as Mr. Zane must appear in it as the grantors. We do not claim that Mr. Zane's grant could modify these rights, but that the grant of Mr. Zane and the legislature together did so.

1. It must be conceded,—for the doctrine is too well established to be any longer open to controversy,—that if the charter had in terms repeated

the provisions of the ferry law and applied them to the proposed bridge, the grant would have vested in the plaintiff in error, by an inviolable contract, the exclusive right of transporting persons, animals and vehicles over the Ohio river within one half mile of its bridge. It will also doubtless be conceded that if the charter, without repeating at large the provisions of the ferry law, had merely said that the plaintiff in error should have such rights and privileges as then appertained to ferries, the same result would follow. It narrows down to a mere question of statutory construction whether the language which was actually employed by the legislature did not mean tbe same thing. The intention was that the plaintiff in error should have as part of its charter, the rights and privileges which belonged at the time to ferries. It was necessary, however, that the owners of the ferries should be protected, so that their rights should not be wrested from them without compensation,—though according to the modern theory this was wholly unnecessary. The legislature could not at once and directly vest the exclusive rights which it wished the plaintiff in error to have without doing violence to the rights of the owners of the ferry. This care by the legislature for the rights of the ferry owners is further manifested by the provision in the 16th section of the aet of 1847, for the payment to one of them of a certain sum. It therefore gave to the plaintiff in error the power, not to extingnish, but to acquire these ferry rights, and after acquiring to hold them. In view of the situation with which the legislature was confronted, it is difficult to conceive how it could more plainly have expressed its intention that the plaintiff in error should hold and enjoy the exclusive rights and privileges which are now brought in question.

Look at the same matter from another standpoint. The state court and the counsel for the defendant in error have persisted in assuming that because in Zane's hands the ferry rights were destructible, therefore the state had made no inviolable contract, and no contract at all, with the plaintiff in error. The premise warrants no such conclusion. The ferry rights formed the subject-matter of the contract between the plaintiff in error and the state. The state said, in effect, that the plaintiff in error should have,—should "acquire and hold,"—these rights. If the rights were then exclusive, the state agreed that the plaintiff in error should hold them as they then were. This is the contract which is inviolable and which the state has attempted to violate. The rights which formed the subject-matter of the contract were the rights as then defined in the general laws of the state, not the rights as they might become by reason of subsequent modifications. The contract was a present, one, involving a grant by the state of rights which then existed and whose nature was known to both parties to the contract. There is nothing

anomalous or extraordinary about this. The state retains its power over ferries, and may alter or abolish their rights at will. The state might have retained its power over this particular ferry, and the rights pertaining to it. It has not done so. For reasons of policy which seemed to it sufficient, in consideration of a public improvement which it looked upon as worth the price, the state has contracted with a corporation upon the subject of these rights and has agreed that the corporation may hold them. The inviolability of the rights grows not out of the nature of the rights themselves, but out of the inviolability of the contract.

3. In the court below the defendant in error placed great reliance on the case of *Charles River Bridge* v. *Warren Bredge*, 11 Pet. 420. A ferry privilege, which seems to have been exclusive, had been granted many years before to Harvard College. The Charles River Bridge Company was incorporated for the purpose of erecting a bridge near the ferry site, and was authorized, upon making a designated compensation to the college, to *extinguish* the ferry franchise. There was nothing in the charter of the bridge company authorizing it to acquire or hold the ferry rights, and nothing which intimated a legislative intention that these rights should subsist or that any transfer of them should be made to the bridge company. The building of a rival bridge having been authorized by the legislature, the Charles River Bridge Company sought to have the erection of it enjoined. This court, declining to consider the question of vested rights as being beyond its jurisdiction, held that the plaintiff had never acquired the ferry rights, whether those were exclusive or not, and that the authority to build a bridge did not, of itself, imply a contract that no other bridge should be authorized, the building of which latter would impair the value of the former. The court laid down the proposition, the correctness of which is freely conceded, that a contract between the state and a corporation, granting exclusive privileges to the latter, will not be raised by implication, but must be clearly expressed. This case illustrates the difference between the mere reference from one statute to another, and the construction of the statutes when placed together, on the one hand, and, on the other, the raising of a contract by implication, the deduction from privileges which are granted of the right to other privileges which are not.

There are two obvious distinctions between that case and the case at bar. First, there is no hint in the charter of the Charles River Bridge Company, or in anything to which that charter refers, of any exclusive privileges. The right to these was sought to be inferred from the mere fact that a bridge was authorized. It was claimed that the legislature must have intended to grant exclusive privileges, because such privileges were requisite in order to make the grant valuable. It was in answer to this suggestion that the rule was cited against implying a con-

tract. In our case there is an express reference to the exclusive privileges with which the law at that time clothed ferries, and a manifest intention that the defendant should come into the enjoyment of these privileges. What other ferry rights and privileges could have been intended? Not the right to establish and maintain a ferry and take tolls. The legislature by another section of the same act gave these rights to the plaintiff in error, or, at least, the right to establish and maintain an equivalent bridge and take tolls. What other ferry rights or privileges were there, except the right of immunity from competition? Second: In the Charles River Bridge case the ferry rights were in terms extinguished. There was no transfer of them to the bridge company, and no intention expressed by the legislature that they should be preserved. In our case, the intention was manifest that the ferry rights should not be extinguished, but should be acquired and held by the plaintiff in error. If the only purpose had been that compensation should be made to the ferry owners for the destruction of the ferry by the building of the bridge, it would have been easy to provide that damages should be ascertained and paid, and the ferry rights thus extinguished. Instead, there is a provision for the benefit, not of the ferry owners, but of the bridge company, the intention of which was that these ferry rights should be preserved and that they should vest in and be held by the company.

We do not ask the court to raise a contract by implication. We ask merely that the established rules of construction be applied to the grant. "If there is no ambiguity in the charter, and the powers conferred are "plainly marked, and their limits can be readily ascertained, then it is "the duty of the court to sustain and uphold it, and to carry out the true "meaning and intention of the parties to it. Any other rule of con- "struction would defeat all legislative grants, and overthrow all other "contracts." [3 Wall. 75.] Where is the ambiguity here? Is a grant rendered ambiguous because part of it is made by reference to another instrument? Can there be any doubt what were the rights and privileges which the plaintiff in error was to acquire and hold? Are not the powers plainly marked and their limits readily ascertained? It must be remembered that we are not called upon to show a formal contract whereby in technical phrase the mutual obligations are fully set forth. *Proprietors of Bridges* v. *Hoboken L. & I. Co.*, 13 N. J. Eq. 81. It is sufficient for us to show that in the charter, there was expressed with reasonable clearness, the legislative intention that the plaintiff in error should have the exclusive privileges which are claimed for it. If we show the intention to grant the exclusive privileges, a contract will then, according to incontestible rules of law, be established, and this contract cannot be violated.

December 5th, 1890.

DANIEL LAMB,
A. J. CLARKE,
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*Attorneys for Plaintiff in Error.*

# APPENDIX.

## AN ACT

To revive and amend the act entitled an act incorporating a company to erect a toll-bridge over the Ohio River at Wheeling, passed February 17, 1816, and the act amendatory of said act passed March 10, 1836.

(*Passed March* 19, 1847.)

Charter of Wheeling toll bridge company revived.

1. Be it enacted by the General Assembly, that the act entitled "an act incorporating a company to erect a toll bridge over the Ohio River at Wheeling," passed February seventeenth, eighteen hundred and sixteen, and the act to amend the same, passed March tenth, eighteen hundred and thirty-six, be and the same are hereby revived and continued in force, except so much thereof as is hereinafter repealed.

Transfers of stock.

2. That the present owners or holders of shares in the capital stock in the Wheeling and Belmont Bridge Company, which was incorporated by said first mentioned act, or in the bridge which has been erected by said company from Zane's Island to the State of Ohio, be and they are hereby respectively authorized to sell and transfer any or all such shares to other persons, or to the said company or bodies politic; making such transfers on a proper book or books to be kept by the said company and including in such transfer, such rights, interests, shares or estates as may be agreed upon to or in said bridge heretofore erected with its easements, ways, privileges and appurtenances.

Conditions and agreements for transfers.

3. Such transfers or any of them may be made subject to such agreements or conditions that the shares in the capital stock so transferred shall be deemed and taken to be wholly or partly unpaid, so that the whole or residue of the original amount thereof, may be called in and collected by the company in the manner provided in the said first mentioned act; or that the purchasers thereof shall pay to the present owners or holder aforesaid any sum or sums of money on account of the said bridge already erected or that the said present owners or holders or any of them may retain or reserve any number of their shares of said capital stock in such manner that the same shall

be deemed and taken to be fully or partly paid in by the transfer of the said bridge or any shares, interests or estates therein, or that no dividend shall be payable on any shares until the same be fully paid in, or subject to any or all of these agreements or conditions.

Capital stock.

4. Whereas the said capital stock of said company is limited to two hundred thousand dollars, and the present value of the said bridge is estimated to be sixty-five thousand dollars. *Be it further enacted*, That the capital stock of said company may be any amount not exceeding one hundred and thirty-five thousand dollars over and above the amount which may be appropriated or reserved in money or stock to pay for the said bridge or any shares, interests or estates therein, and any easements, ways or privileges belonging thereto, or ferry rights now enjoyed in connection therewith, or rights of way to pass from the said bridge to the bridge hereinafter authorized to be erected.

Board of managers how appointed.

5. Whenever by virtue of any such tranfers, the number of stockholders shall exceed ten, a board of managers shall be elected by the stockholders at such time and place as shall be appointed by Henry Moore, Daniel C. List, William Paxton, William T. Selby, James E. Wharton, James Baker, Thomas Sweeney and Thomas Hughes, or any five of them, public notice thereof having been given two weeks before the time of such elections: such board shall elect a president from among their own number and upon the election of such board and President, the said Wheeling and Belmont Bridge Company shall be deemed to be completely organized as a body politic, in full possession of all the rights, privileges and powers conferred on the said company by the said acts hereby revived.

Election of President.

Company organized.

Board of managers how constituted.

6. The board managers of the said company shall consist of nine instead of thirteen managers as directed by said first mentioned act, and any five of them shall be a quorum for the transaction of business; they shall be elected annually, and shall remain in office one year from the time of their election or until their successors shall be elected; the by-laws shall prescribe the time manner and place of such elections, and the board shall have all the powers, rights and duties which were conferred or imposed on the board of managers by the first mentioned act.

When elected, their term of office.

Their powers, rights and duties.

Ratio of votes.

7. In all elections and other matters to be decided by the stockholders, every stockholder shall have one vote for every share he owns, not exceeding twenty, one vote for every two shares exceeding twenty, and not exceeding one hundred, and one vote for every five shares exceeding one hundred.

Power to erect wire suspension bridge.

8. The said company shall have power to erect and keep a wire suspension toll bridge on and from Zane's Island to and upon the main Virginia shore or bank at the city of Wheeling.

Council of Wheeling authorized to acquire stock.

9. The council of the city of Wheeling shall have authority to purchase or acquire for said city any number of shares in the capital stock of said company not exceeding two thousand and to pay the amount thereof by issuing or causing to be issued bonds of the said city or otherwise; and to vote on such stock by proxy or proxies to be by said council appointed from time to time.

Proxies of council.

N. Westerh Bank authorized to acquire stock.

10. The Directors of the North Western Bank of Virginia shall have authority (with the assent of the stockholders thereof or a majority of them), to purchase or acquire for said bank any number of said shares of capital stock not exceeding one

thousand, and to vote upon the same by proxy or proxies to be appointed by said Directors from time to time. And the Directors of the Merchants' and Mechanics' Bank of Wheeling shall have authority (with the assent of the stockholders thereof or a majority of them) to purchase or acquire for said last mentioned Bank, any number of said shares of capital stock not exceeding one thousand, and to vote upon the same by proxy or proxies to be appointed by said Directors of said last mentioned Bank frrom time to time. Their proxies. Merchants' and Mechanics' Bank of Wheeling to acquire stock. Their proxies.

11. The shares of capital stock in said Company shall be deemed and taken to be personal estate to all intents. Stock to be personal estate.

12. The said company shall have power to purchase or acquire and hold all necessary rights of way on or across Zane's island and other necessary ways, easements, rights, privileges and estates for the use, convenience or accommodation of their bridges or either of them, and all ferry rights or privileges between Zane's island and the main Virginia shore, at the city of Wheeling. Power to acquire right of way over Zane's Island, and ferry privileges.

13. If any shares of said capital stock shall be transferred or forfeited to the said company, the said board of managers, shall have power to sell, hold or dispose of the same for the benefit of the company in such manner as they may deem most expedient. Company authorized to dispose of stock transferred to them.

14. If the said bridge mentioned in the eighth section of this act, shall be so erected as to obstruct the navigation of the Ohio river in the usual manner by such steamboats and other crafts as are now commonly accustomed to navigate the same when the river shall be as high as the highest floods therein heretofore known, then unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last mentioned bridge may be treated as a public nuisance and abated accordingly. Bridge not to obstruct navigation of Ohio river.

15. The eighteenth and nineteenth sections of the said first mentioned act, and all parts of said acts which are inconsistent with any part of this act shall be and are hereby repealed. Repealing clause.

16. The said company shall pay to Mrs. Mary L. Dorsey, two thousand dollars for her interest in the ferry across the Eastern branch of the Ohio river at Zane's Island, according to a contract made with her for that purpose by William Paxton, Thomas Sweeney, James E. Wharton, Thomas Hughes, William T. Selby and James Baker, dated the twelfth February, eighteen hundred and forty-seven, the said company shall save harmless the persons who have agreed to guaranty to her the fulfilment of said contract. Sum to be paid Mrs. Dorsey for her ferry.

17. This act shall be in force from its passage. Commencement.

IN THE

# Supreme Court of the United States.

THE WHEELING AND BELMONT BRIDGE COMPANY,
Plaintiff in Error,

*vs.*

THE WHEELING BRIDGE COMPANY,
Defendant in Error.

BRIEF IN SUPPORT OF MOTION BY DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR, OR TO AFFIRM JUDGMENT.

WHEELING, W. VA.:
DAILY INTELLIGENCER STEAM BOOK AND JOB PRESS.
1890.

IN THE

# Supreme Court of the United States.

THE WHEELING BRIDGE COMPANY,
Plaintiff Below and Defendant in Error,
*vs.*
THE WHEELING AND BELMONT BRIDGE COMPANY,
Defendant Below, Plaintiff in Error.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR AND MOTION TO AFFIRM JUDGMENT.

This case is a proceeding begun by the Wheeling Bridge Company in the Circuit Court of Ohio County, West Virginia, to condemn for its use a parcel of ground owned by the Wheeling and Belmont Bridge Company. The latter company tendered seven pleas, on four of which issue was joined, and that issue was found against the defendants. With those pleas this court is not concerned. The other three pleas, numbered 5, 6 and 7, were held insufficient in law, and an order was entered appointing commissioners to ascertain a just compensation to the owner of the land. Before the commissioners acted a writ of error was taken, and the case went to the W. Va. Court of Appeals, where the order made below was affirmed. To that judgment of affirmance this writ of error was sued out.

THE MOTION TO DISMISS.

The writ of error should be dismissed for the reasons following:

I. The judgment here sought to be reviewed, being the judgment of the Court of Appeals affirming the order of the Circuit Court, is not final. The order which was so affirmed, declares that the petitioner has the right to take the property

sought by it, and appoints commissioners to ascertain what will be a just compensation for the land proposed to be taken. This is the judgment which the Plaintiff in Error says is final in its nature.

1. In no sense which can be given the word "final," whether as it is ordinarily or technically used, can this be true. The only right this order gives the petitioner is to have another question in the case tried, that is to say, the question of the value of the land. After that is ascertained, the Circuit Court (Code W. Va. Chap. 42, sec. 17) may or may not confirm the report of the commissioners. Until the report is confirmed, the petitioner would not have a final judgment for the land sought by it. In the court below, attention was called to section 20 of Chapter 42 as giving the petitioner some right before the confirmation of the report. That right, however, is not the one in controversy here. That section substantially provides that upon paying into court a sum of money presumably equal to the value of the land taken the petitioner may occupy the land until the final determination of the case. It will be observed that even that right could not be exercised by the petitioner until it should pay into court the amount ascertained by the commissioners, and when that was done and the petitioner had thereby indicated its purpose to go into possession, it would be time enough to allow a writ of error, if one could at any time lie to an order which related simply to the possession of the land *pendente lite*.

Coming back to the only question upon which there can be a final judgment in such a case, that is, the question of transfer of the title to the land, it will further be observed that not even the confirmation of the commissioners' report will give the petitioner such title. After the report is confirmed, the petitioner (Chap. 42, sec. 18) may or may not pay into court the amount found by the report. Until it does make such payment, it has no right or title under the confirming order. So that if there were a judgment confirming the report in such a case, it would be merely conditional and would have no force or vitality, unless the petitioner complied with the condition expressed in the law, and paid into court the amount found by the commissioners. Then, for the first time, would there be a judgment or order which had any effect as against the land owner, or by which he could possibly be injured.

2. The general doctrine is, that any decree or order is final which disposes of the whole subject, gives all the relief that was

contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause, save to superintend ministerially the execution of the decree. IV Minor's Institutes, 959. Many of the Virginia cases on this question are there cited.

It needs no discussion to show that the order here appealed from falls short in every respect of the definition of a final order as above stated.

The decisions of the W. Va. Court of Appeals upon the question what decrees are final are in full accord with the views above quoted from Minor's Institutes and sustained by the Virginia authorities; or if there is any difference it is that the West Virginia Court has leaned more than the Virginia Court against the claim that certain judgments are final. Beuhler vs. Cheuvront, 15 W. Va. 480; Kelly vs. Lively, 23 W. Va. 1; Steenrod vs. R. R. Co., 25 W. Va. 1; and especially Harris vs. Hauser, 26 W. Va. 602 and Hill vs. Als, 27 W. Va. 219.

The precise question here involved has been decided in the W. Va. Court of Appeals. In Pack vs. Chesapeake & Ohio R. R. Co., 5 W. Va., 118, it was held that the court not having acted upon the commissioners' report, there was no final judgment, and therefore, the appeal could not be properly taken.

In the case at bar a stay was granted by the Circuit Court, because that court adopted the defense's view that the question whether the order was appealable was involved in the case of the P., W. & K. R. R. Co. vs. Benwood Iron Works, 31 W. Va. 710. In that case, the propriety of allowing the appeal at that stage was not presented to the Court of Appeals, because the plaintiff wished to prevent further delay, and wished the court as soon as possible to decide the case. Both sides urged upon the court a decision on the merits. The same was true in the case now under consideration. In the P., W. & K. R. R. Co. case, as will appear by the defendant's brief, if not by its petition in the Court of Appeals, it was claimed only that an appeal lay under the third clause of Sec. 1 of Chap. 135 "concerning mills, roads, ferries or landings." It was claimed that a railroad came under the term "road," and upon that view alone was an appeal granted. As I have said, the propriety of the allowance of the appeal was not suggested to the court, nor considered by it. If it had been the court doubtless would have referred to the case of Pack vs. Chesapeake & Ohio Railroad Company, 5 W. Va., 118, where the precise question here involved was the

only question raised and where that question was fully argued and expressly decided against the appeal.

The State Constitution, Article VIII., Section 5, provides, that every point fairly arising upon the record of the case shall be considered and decided by the Court of Appeals; and that the reasons therefor shall be stated in writing, and that a syllabus of the points adjudicated shall be prepared and published. As no allusion can be found in either the syllabus or opinion in the case of the P., W. & K. R. R. Co. vs. Benwood Iron Works to the character of the order there appealed from, the Court of Appeals did not consider the nature of that order as presenting any question arising on the record of the case, and it certainly did not consider that one of the points there adjudicated was, that a writ of error would lie to an order appointing commissioners in a condemnation case.

In P., W. & K. R. R. Co. vs. Benwood Iron Works, "no question of jurisdiction was raised, considered or decided, and therefore it can have but little weight in determining the question of jurisdiction under consideration." Childs vs. Hurd, 25 W. Va. 538. "Jurisdiction of the appeal having thus been assumed as a matter of course without having the attention of the court called to that question, the case furnishes no authority by which the court is bound to take jurisdiction of appeals in similar cases." Id. 539.

3. In the Circuit Court it was claimed on behalf of the Plaintiff in Error, that this order was final in its character, because the question of the petitioner's right to take was thereby finally determined. If that be the criterion, however, then every order that determines anything is appealable, because something is thereby finally determined, at least in the court making the order. If for example the defendant at the outset raised the question of the court's jurisdiction of the proceeding, and the court determined that question in favor of the jurisdiction, the defendant could at once appeal from that order, because the court had finally decided that it had jurisdiction of the proceeding. So there might be an appeal at every step of a proceeding such as this, in the face of the statutory provision, Code Chapter 42, section 20, that no order shall be made to stay the petitioner in taking possession of the land, unless the applicant be insolvent, or transcends its authority, or threatens injury which cannot be adequately compensated in damages.

4. The order of the State Circuit Court was merely interlocutory, and no matter what view the State courts may take of the right to appeal, this cannot enlarge the jurisdiction given this Court by act of Congress. Reddall vs. Bryan, 24 How. 420. In that case, as here, the order below was affirmed by the State Court of Appeals, and the case was remanded for further proceedings. This court held that it was without jurisdiction; and it so held in the like cases of Gibbons vs. Ogden, 6 Wheat. 448; Verden vs. Coleman, 18 How. 86.

No judgment is final which does not terminate the litigation between the parties. St. Clair Co. vs. Livingston, 18 Wall. 628.

Interference with the progress of public works ought not to be permitted until there is some judgment or order, the execution of which may do the plaintiff in error some substantial injury. Certainly that is not the case here, where the only thing that could be done to carry out the judgment here complained of would be to proceed to try other questions in the case, and where until other orders are made in the case, no possible injury could result to the Plaintiff in Error.

II. There is here no question of a statute impairing the obligation of a contract, or otherwise repugnant to the Constitution or laws of the United States; and there is here no federal question. It is supposed that the only claim which can be made in behalf of the jurisdiction of this court over this case in this respect is, that the act of the Legislature of West Virginia, passed March 25, 1882, which permitted the erection of toll bridges over the Ohio River, and provided that no ferry privileges or franchises should preclude the erection of such bridges was an act which impaired the obligation of a contract which is claimed to have arisen between the State of Virginia and the Wheeling and Belmont Bridge Company out of an act passed by the Legislature of Virginia in 1840, long after the charter of that company was granted, which provided, "that it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one half mile in a direct line of any other ferry legally established over the same watercourse."

If any such federal question was presented, it was by pleas numbered five, six and seven, which were tendered by the defendant in the Circuit Court for Ohio county. These pleas were objected to as insufficient, and the only judgment of that court

respecting them was, that they were rejected. The only judgment of the Supreme Court of Appeals of West Virginia, is that the judgment of the Circuit Court of Ohio County was affirmed. Nothing further can be found upon the record to show that any federal question was raised, was involved or was decided.

1. No federal question was presented by either of these pleas. Plea No. 5 says, in substance, that the defendant under its charter and authority from the Legislature erected a bridge between Zane's Island and the main shore of the Ohio River; that it was empowered to purchase all ferry rights between those shores; that the defendant in 1847 purchased from the former owners a ferry lawfully maintained between those shores, together with the rights and privileges incident thereto, and has since owned and maintained those rights; that one of the rights incident to the ferry was the exclusive right to transport persons across the Ohio River within the limits of one-half mile of said ferry; that the plaintiff's proposed bridge is within half a mile of the defendant's bridge.

There is here no averment of any facts showing a contract for the exclusive right of transportation within a half mile limit, and indeed, no averment of the existence of such a contract. There is no averment of the passage of any law impairing the obligation of any contract.

The averments of plea No. 6 are the same, with this further averment: "And so the defendant says that out of the said powers and authorities granted to the said defendant as aforesaid, and the acquisition by the said defendant of the said ferry and the said rights, privileges and franchises, arose a contract between the said State of Virginia and the said defendant that the said defendant should have and enjoy, during its chartered existence, the exclusive privilege of transporting persons, animals and vehicles across the Ohio River at all points within a half-mile of the location of the said ferry, and that upon the formation of the State of West Virginia, in the ownership of the Ohio River and its shores became a party to the said contract and bound by the same. Yet the said defendant says that the Legislature of this State, not regarding the obligation of the said contract, on the 25th day of March in the year 1882, passed an act which provided that corporations might be formed for the purpose, and that when so formed they might erect and maintain toll bridges over the Ohio River for the transportation of persons, vehicles and other things over the said river, and that no ferry

privileges or franchises should preclude the erection of such bridges or entitle the owner of such privileges to damages in case of any such bridge. And the said defendant says that the only authority of law which the said petitioner has or pretends to have for the erection of the bridge so to be erected and maintained by it as aforesaid is the said act of the Legislature of West Virginia. And the said defendant says that the said last mentioned act is unconstitutional and void as impairing, and in so far as the same impairs the obligation of the said contract between the said States of Virginia and West Virginia and the said defendant." There is here no averment of the existence of a contract. This is simply the conclusion of the plea. As a conclusion based on the facts before recited, "*So* the defendant says" that a contract arose for the exclusive privilege of transportation within the half-mile limit. Among the facts before recited there are none which support such conclusion. No fact is averred in the plea which even tends to show the existence of a contract.

In both these pleas numbered 5 and 6 it is averred that one of the rights incident to the ferry was the exclusive right to transport within the half-mile limit. But neither of these pleas avers that this exclusive right was conferred by the Legislature or was given by any contract with the State. For all that appears, this exclusive right may have been alleged, because it was supposed to grow out of the ownership of the land by the defendant's vendors, or it may have been alleged, as we say it was, without any ground or pretext. Nor does plea No. 7 aver the existence of any contract between the State and the defendant. It avers that in pursuance of the defendant's charter and the powers and authorities from time to time granted by the Legislature, defendant erected, and has maintained a bridge, and that out of the said charter and the said powers and authorities and the erection of the said bridge arose a contract between the State and the defendant that the State would not permit any other bridge so near to the defendant's bridge as seriously to impair its value by diverting travel and tolls. What is provided in this respect by the charter and the said powers and authorities does not appear by the plea. The facts are not stated. All three of these pleas, in attempting to allege the existence of a contract, alleged not facts from which the court can ascertain whether such a contract can exist, but alleged mere legal conclusions. In this respect these pleas are more objectionable than

those which were held bad by this court in the case of Pumpelly vs. Green Bay and Mississippi Company, 13 Wallace 166. For this reason, all of these pleas were bad and ought to have been so held by the W. Va. Court, though such reason may not appear in the record. If a plea is bad for any other reason it is no matter that a federal question may also have been decided. "The decision of such a question was not necessarily involved in the determination of the case." Moore vs. Mississippi, 21 Wall. 639.

2. Even if these pleas can be taken to present a federal question, its determination was not necessary to the result reached by the State courts. "We cannot re-examine the judgment or decree of a State court simply because a federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered. Bolling vs. Lersner, 91 U. S., 594. This court has no jurisdiction, unless the record shows affirmatively, or by fair implication that a federal question necessary to the determination of the case was involved. Boughton vs. The Exchange Bank, 104 U. S., 427.

No federal question is raised, for the decision of the State court is broad enough to maintain the judgment independently of the federal question. Beatty vs. Benton, 135 U. S., 234.

In order to reach the conclusion of the State courts that these pleas were bad, it was not necessary to determine or consider the federal question supposed to exist. The pleas might well have been held bad for the technical insufficiency of the pleading, and in such case jurisdiction will not be entertained under the 25th section of the judiciary act. Commercial Bank vs. Rochester, 15 Wall. 639.

3. It does not appear by the record expressly or by necessary implication that the Court of Appeals passed on the validity of any statute of the State. For aught that appears the court may have decided the case on the construction of the statute of 1840, holding (as that court in fact did) that the prohibition of that statute extended only to the County Courts and did not reach the Legislature. In such case the writ of error is to be dismissed. Insurance Co. vs. The Treasurer, 11 Wall. 204.

4. The most that can be said is, that in this case the Court of Appeals held that there was no contract between the State of Virginia and the defendant. Before the defendant was incor-

porated and at that time, there was no law preventing either the Legislature or the county court from establishing a ferry within the half mile limit. Years after the defendant was chartered, the Legislature prohibited the county court from establishing a new ferry within the half mile limit, and years before the plaintiff undertook to construct its bridge that prohibition on the county court was repealed. So that the law now is the same which existed when the defendant was incorporated. The law which is set up as impairing the obligation of the contract is practically the same law which was in force when the charter (the supposed contract) was granted. In such case this court has no jurisdiction under the 25th section of the judiciary act, now section 709 of the Revised Statutes. Railroad Company vs. McClure, 10 Wallace, 511.

The act forbidding the county courts from establishing ferries within the half mile limit was like the act considered in Beers vs. Arkansas, 20 Howard, 529—not a contract but an ordinary act of legislation.

5. The plaintiff in error has at times claimed that the Virginia Act of 1847 which merely authorized it to buy Zane's ferry with its rights, while the law was in force prohibiting the county courts from establishing a new ferry within half a mile, in some way constituted a contract that such prohibition should continue, so that in the authority to buy and in the act of buying, the thing bought should change its nature, and that which might be subject to repeal in the hands of the vendor should in the hands of the vendee become sacred. Such a claim is hardly intelligible. It is sufficient to say that the act of 1847 does not purport to have any such effect, and there being no statute such as that alleged by the plaintiff in error, the writ of error must be dismissed. Millingar vs. Hartupee, 6 Wall. 258. The act of 1847 was nothing more than an enabling act—such as that in Att'y Gen. vs. Federal St. Meeting House, 1 Black 262. The act of 1847 is as follows: (Acts of Virginia, 1846, pages 149 to 151, Section 12.) "The said Company shall have power to purchase or acquire and hold all necessary rights of way on or across Zane's Island and other necessary ways, easements, rights, privileges and estates for the use and convenience and accommodation of their bridges or either of them, and all ferry rights and privileges between Zane's Island and the main Virginia shore at the City of Wheeling."

But if the court should be of opinion that it has jurisdiction it is manifest that this writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument. The judgment should therefore be affirmed. The only questions which the plaintiff in error can possibly contend are presented by these pleas have been determined against the pretentions of the plaintiff in error by decisions of this court which are exactly in point.

The only basis of a claim for the exclusive right within the half mile limit is the Virginia act of 1840, passed as a measure of public policy, as a general law of the State of Virginia, as an ordinary act of legislation, after the defendant was chartered, and without the purpose or effect of conferring any vested right upon any existing ferry, and of course without constituting any contract with the owners of such ferry. That law did not provide that no ferry should be established within half a mile of an existing ferry or that the Legislature would not establish a new ferry within that distance of an old one, but simply that the county court should not do so.

In Sommerville vs. Wimbish, 7 Grat., Judge Baldwin, in delivering the opinion of the court—on page 231—with respect to opposite ferries, says: "It is true that by the act of 1840 (Sess. Acts 1839–40, ch. 79, sec. 1, p. 58), in order to prevent injurious competition, the courts are prohibited from granting leave thereafter to establish a ferry over any water-course within one-half mile, in a direct line, of any ferry legally established over the same water-course. But if that prohibition embraces opposite ferries, as to which we express no opinion, it was no surrender of the legislative power thereafter to establish such opposite ferries whether directly or through the agency of the courts."

This precise question was determined by this court in Fanning vs. Gregoire, 16 How. 523. In that case the Legislature of the Territory of Iowa authorized F., his heirs and assigns, to establish and keep a ferry across the Mississippi river, at the town of Dubuque, for the term of twenty years; and enacted further that no court or board of commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque. And it was urged that the prohibition on the court and board of commissioners to grant a license for another ferry showed an intent to make the grant exclusive; but the court

held that, although the court and commissioners were prohibited from granting another license at Dubuque, yet this prohibition did not apply to the Legislature.

The record alone can be looked to to ascertain the jurisdiction of the Supreme Court under the 25th section of the judiciary act. Mich. Central R. R. Co. vs Mich. Southern R. R. Co., 19th Howard, 381. Even under the rule as modified by Murdock vs. Memphis, 20 Wall., the opinion of the West Virginia Court of Appeals may not be looked to as part of the record, but I may quote by way of argument what the court says on this question:

"It is conceded in the argument and briefs of counsel that 'Zane's Ferry,' which the defendant purchased, was licensed at an early day, when no such exclusive privilege as that claimed was attached to the franchise. Subsequently (1840), the General Assembly of Virginia by general law, and gratuitously, without further consideration from established ferries, and as a bounty or subsidy to them, prohibited the county courts from licensing a ferry within one-half mile in a direct line from an established ferry. This subsidy, so far as it favored existing ferries, was purely gratuitous, and as such subject to withdrawal by repeal as any other act of the Legislature, designed to encourage a particular branch of industry, or improvement.

"Zane, as a recipient of a gratuitous bounty, could not complain if the same legislative wisdom which conferred, should upon reasons of public policy, withdraw it. The Wheeling and Belmont Bridge Company was authorized (1847), to purchase his rights, privileges and franchises. But such purchase could not enlarge or add to them. The idea that such authority to purchase enlarges the estate of the vendor, and converts an incidental bounty into a vested right, cannot be successfully maintained. None of the authorities relied upon tend to sustain such a proposition, nor even bear upon it.

"The only new grant which entered into the charter of 1847 was the right to purchase certain ferry privileges, and the authorities relied upon by the counsel for appellant or plaintiff in error, go to the point that this grant was a contract, and irrevocable; but they do not throw any light upon the question whether this grant did or could enlarge such ferry privileges, or render them any more extensive than they were in the hands of the original licensee.

"We hold that the grant could have no such effect, and that, as the feature of monopoly, so far as it pertained to Zane's ferry,

was no part of his original license or charter but only an incident derived from a general statute passed long after the date of his franchise, said statute, so far as his rights were concerned, was subject to repeal by the Legislature, and the monopolistic feature liable to revocation by ordinary legislation. And being of this character in his hands, it remained the same in the hands of the vendee, the W. and B. Bridge Company; see Mason vs. Bridge Co., 17 W. Va., 396, and Wimbish vs. Sommerville, 7 Grat. 205. The Legislature in 1882, having passed an act repealing the clause in the statute regarding the establishing of ferries, which in Mason vs. Bridge Co., 17 W. Va., had been construed to prohibit the building of a competing bridge within one-half mile of an established ferry, it follows that the plaintiff in error cannot complain that a new bridge is to be built over the Ohio river within one half mile of its own structure, and its pleas putting the matter in issue, as a question of fact, were properly rejected."

The question presented in plea No. 7, if it be a federal question, was determined by the decisions of this court in the cases of Charles River Bridge Company vs. Warren Bridge Company, 11 Peters, 420; Turnpike Co. vs. State, 3 Wall. 210.

Thus the only questions sought to be presented by these pleas have been definitely determined against the plaintiff in error by decisions of this court. Under such circumstances, it is manifest that this writ of error was taken simply for purposes of delay, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Repeated rulings of this court show that a motion to affirm in a case like this is proper and should be granted. Ruckman vs. Bergholz, 131 U. S. cxliii; Hinckley vs. Morton, 103 U. S., 764; The S. C. Tryon, 105 U. S., 267; Evans vs. Brown, 109 U. S., 180; Walston vs. Nevin, 128 U. S., 578; The Alaska 130 U. S. 201; Foree vs. McVeigh, 131 U. S., cxlii; Bell's Gap R. R. Co. vs. Pennsylvania, 134 U. S. 232.

Respectfully Submitted,

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